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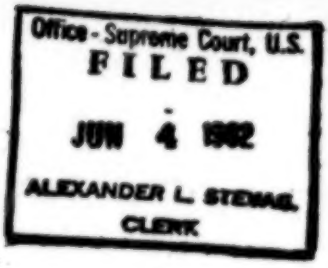

NO:_____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

EMILIO GARCIA,

Petitioner,

vs.

UNITED STATES OF AMERICA, et al.,

Defendants.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT, UNIT B.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Organized Crime Control Act of 1970, Pub.L. 91-452, Title V, §§501-504, 84 Stat. 933, 18 U.S.C. Chap. 223 (1976), which establishes the United States Marshal's Witness Protection Program, providing the Attorney General of the United States with absolute unreviewable discretion to terminate a witness' participation for the exercise of his First Amendment rights, violates the witness' substantive due process rights under the Fifth Amendment of the United States Constitution.

2. Whether the termination of a witness from participation in the United States Marshal's Witness Protection Program by the Attorney General of the United States and his delegates, without notice and an opportunity to be heard

violates the witness' procedural due process rights under the Fifth Amendment of the United States Constitution.

3. Whether a participant on the Witness Protection Program may be arbitrarily terminated from the Program for the exercise of his First Amendment rights.

4. Whether a participant's termination from the Witness Protection Program which is arbitrary and without justifiable basis is an intrusion by the Government on activity involving fundamental rights, and therefore an unwarranted invasion of the participant's constitutional right to privacy.

5. Whether a private cause of action for damages can be implied directly under the Organized Crime Control Act of 1970, Pub.L. 91-452, Title V, §§501-504, 84 Stat. 933, 18 U.S.C.

Chap. 223 (1976), which established the United States Marshal's Witness Protection Program.

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NO._____

IN THE SUPREME COURT OF

THE UNITED STATES

OCTOBER TERM, 1981

EMILIO GARCIA,

Petitioner,

vs.

UNITED STATES OF AMERICA, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT, UNIT B

The Petitioner, EMILIO GARCIA, 1/ respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, Unit B,

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1/ Emilio Garcia is the Petitioner's true name. The Protection Program provided Petitioner with a new identity and that has not been utilized by the Petitioner in this case.

entered in this proceeding on February 4, 1982. 2/

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, Unit B, which appears at page (1) of the appendix, is reported at 666 F.2d 960 (5th Cir., Unit B, 1982). Petitioner was the appellant in the Fifth Circuit, and the plaintiff before the United States District Court Southern District of Florida. In ruling upon the instant

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2/ The parties to the proceedings in the court whose judgment is sought to be reviewed other than those contained in the caption of this Petition are Griffin Bell, Attorney General, United States Department of Justice; William E. Hall, Director, United States Marshal Service, United States Department of Justice, Donald D. Forsht, United States Marshal for the Southern District of Florida, Frank W. Noe, Deputy United States Marshal, Raymond C. Pope, Deputy United States Marshal, and John W.

case, the Fifth Circuit affirmed the Order of the United States District Court Southern District of Florida, entered on June 22, 1979, which granted the Respondents' (Defendants below) Motion to Dismiss Count IV of the Third Amended Complaint. The Order of the District Court is reproduced at page (27) of the appendix.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit, Unit B, was entered on February 4, 1982. No petition for rehearing was filed. On April 26, 1982, the Petitioner's application for

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Cameron, Deputy United States Marshal. Each person was named officially and individually. Petitioner however, will now proceed against the Attorney General, United States Department of Justice in his official capacity. All designations in this Petition styled (a-1, a-2 ...) are to pages in the appendix.

extension of time within which to file a petition for a writ of certiorari was granted by Justice Lewis F. Powell, Jr., allowing the Petitioner up to and including June 4, 1982, to file said petition. This petition for certiorari was filed within that time period. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

The Constitutional Provisions and Statutes controlling the disposition of this cause are lengthy. See the Organized Crime Control Act of 1970, Pub.L. 91-452, Title V, §501-504, 84 Stat. 933, 18 U.S.C. Chap. 223 (1976) and Amendments I, III, IV, V, VIII, and IX to the Constitution of the United States. The pertinent text of each, set out

verbatim, appears in the appendix at pages (a-85-a-90).

STATEMENT OF CASE

Petitioner worked for the Bureau of Narcotics and Dangerous Drugs (BNDD) and its successor, the Drug Enforcement Agency (DEA), from January 20, 1970, until November, 1973, as a "special employee" and was a witness for the government in numerous criminal cases against major drug traffickers. 3/ Petitioner related the results of his activity as an informant to the DEA and later testified against alleged violators of the drug laws of the United States. 4/ In return for this cooperation and in

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3/ See paragraphs 58-59, of the Third Amended Complaint on pages (a-63) and (a-64) of the appendix.

4/ See paragraph 62 of the Third Amended Complaint on page (a-67) of the appendix.

consideration of the personal and potential danger to Petitioner and his family, Petitioner, his wife and children were placed under the United States Marshal's Witness Protection Program on or about January, 1974. 5/ Petitioner was promised the following:

(1) Free medical and dental care for himself and his family.

(2) That officers of the United States Marshal's Service would have Petitioner's status changed from refugee to permanent resident.

(3) That Petitioner and his family

5/ Although under the Witness Protection Program, which was established as Title V of the Organized Control Act of 1970, Pub.L. 91-452, 84 Stat. 933, 18 U.S.C. Chap. 223 (1976), the Attorney General was authorized to provide protection for witnesses, the Attorney General delegated his power over the Program to the United States Marshal Service. Order No. 516-73, 38 FR 12917, May 17, 1973, as amended by Order No. 29586, October 26, 1973; 28 C.F.R. §0.111(c) (1980).

would be relocated in another city and given a new identity so that Petitioner and his family would be able to begin a new life without fear for their own safety.

(4) That officials in the United States Marshal's Service would work with Petitioner to find him a job commensurate with his new identity.

(5) That Petitioner would be paid $890.00 per month subsistence money allocated to Petitioner under the Program for at least six months after Petitioner concluded all testimony for the United States, but probably extending for a longer period of time due to the injuries Petitioner received in an automobile accident occurring in November, 1973, while Petitioner was employed by the DEA.

(6) Protection for the Petitioner and his family would continue until the

United States was certain that Petitioner's life would no longer be in danger. 6/

While on the Witness Protection Program between January, 1974 and May, 1975 and again from October, 1975 to January, 1976 and from March, 1976 to December, 1978, Petitioner suffered from injuries received in two automobile accidents while working for the DEA and as a witness for the United States of America. Petitioner's wife also needed medical attention while her husband was on the program. 7/

Petitioner asserted that although he faithfully testified for the

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6/ See paragraph 61 of the Third Amended Complaint on pages (a-65)-(a-67) of the appendix.

7/ See paragraph 64 of the Third Amended Complaint on pages (a-46), and (a-68)-(a-69) of the appendix.

Government on many occasions, the Government wrongfully, intentionally, maliciously and repeatedly dropped him from the Witness Protection Program and otherwise refused to carry out their promises of medical care, financial support and protection. 8/

Because of broken promises, nearly destitute, in need of surgery and fearful for his life, Petitioner spoke to the newspapers in Miami, describing the unfair treatment of the Government. 9/ He was then discharged from the Witness Protection Program on May 15, 1975, until or about October, 1975; from January or February, 1976 until March, 1976; and again on December 1, 1978, through the

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8/ See paragraph 66 of the Third Amended Complaint on pages (a-70)-(a-71) of the appendix.

9/ See paragraph 67 of Third Amended Complaint on pages (a-72)-(a-73) of the appendix.

present. 10/ Petitioner has been arbitrarily removed from the Program. Before and after being terminated from the Witness Protection Program, Petitioner received numerous threats on his life from persons involved in illegal drug trafficking. These threats were brought to the attention of the federal government through its agents. 11/ Additionally, after his termination, Petitioner could not seek gainful employment due to the fact that he could not discuss his

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10/ See paragraph 66 of Third Amended Complaint on pages (a-70)-(a-71) of the appendix. While on the Program in August of 1977, Petitioner's attorney spoke with Mervyn L. Ames, Esquire, Attorney for the Defendants, and was informed that the Petitioner and his family would remain on the Program until, at a minimum, the termination of his lawsuit. However, Petitioner was finally terminated in December of 1978.

11/ See paragraph 65 of the Third Amended Complaint on page 70 of the appendix. Petitioner continues to receive threats upon his life from persons connected with organized crime. In October, 1976, the United States Marshal's Service and the United States Department of Justice

background with prospective employers without revealing information which could endanger his life. 12/

Petitioner subsequently initiated this action in federal district court for the Southern District of Florida, pursuant to Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), 13/ on the grounds

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officials were aware of current information demonstrating that actual threats to the life of Petitioner and his family were made.

12/ See paragraph 70 of the Third Amended Complaint on pages (a-75)-(a-76) of the appendix.

13/ Jurisdiction of the district court was invoked pursuant to 28 U.S.C. §1331(a) (1976) which provides:

> The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

that the Defendants' conduct in arbitrarily removing him from the Witness Protection Program, with full knowledge of their obligation to Petitioner, of the threats on Petitioner's life and of the potential danger to Petitioner and his family, violated several of his constitutional rights. Specifically, the decisions to terminate Petitioner from the Program were made without legal cause: the abrupt discharge without cause, without prior notice and without a hearing violated Petitioner's procedural and substantive due process rights under

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The Petitioner's Third Amended Complaint also contained other counts for breach of contract under the Tucker Act, 28 U.S.C. §1346(a)(2) (1978 supp.) (Count I); declaratory relief pursuant to 28 U.S.C. §2201 (1978 supp.) (Count II); an injunction under the Freedom of Information Act ((FIOA), 5 U.S.C. §552 (1978 supp.) (Count III); an injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure to reinstate the Petitioner on the Witness Protection Program (Count V).

the fifth amendment; the action discharging Petitioner was made, in part, due to the Petitioner's exercise of his First Amendment rights and therefore was unconstitutional; the withdrawal of protection without any justifiable basis constituted an unwarranted invasion of Petitioner's right to be secure in his person from harassment by the federal government; the withdrawal of federal protection exposed Petitioner to the "criminal element" and violated his right to the privacy of his own body from Government invasion; further, the callous discharge of Petitioner from the Program violated Petitioner's Eighth Amendment right to be free from cruel and inhuman punishment. 14/ Before any motion for summary

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14/ See paragraphs 67 through 69 of the Third Amended Complaint on pages (a-72)-(a-75) of the appendix. The Petitioner is no longer alleging that his termination from the

judgment was filed, and before any trial upon the merits, the trial court dismissed Count IV, the Bivens count, of the Third Amended Complaint for failure to state a claim for which relief can be granted. The order appears on pages (a-27-a-28) of the appendix. The Petitioner filed an appeal before the Fifth Circuit Court of Appeals which affirmed the decision of the lower court in an opinion which appears at the appendix on pages a-1 through a-26. 15/ Petitioner did not file a Petition for Rehearing.

Witness Protection Program violated his constitutional rights under the Eighth Amendment's prohibition of cruel and unusual punishment, in light of this Court's decision in Ingraham v. Wright, 430 U.S. 651 (1977).

15/ The Petitioner is not challenging the Fifth Circuit Court of Appeals holding that the United States has not waived its sovereign immunity and is therefor immune from suit.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ to review a ruling that would work a drastic hardship of the thousands of participants in the United States Marshal's Witness Protection Program [16] who have no effective means of voicing complaints about their treatment under the Program. [17] The Fifth Circuit's affirmance of the district court's dismissal of the Petitioner's complaint in effect allows the Attorney General and/or his delegates, the United States Marshal's Service, to arbitrarily terminate a witness' participation in the Program, without any provision for judicial review

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16/ As of August of 1977, there were more than 2,200 witnesses who had been admitted into the Program. U.S. Department of Justice, Report of the Witness Security Program Review Committee, March, 1978 at 1.

17/ Id. at 53.

and in violation of the witness' constitutional rights. The Petitioner alleged in his Third Amended Complaint a Bivens type action for redress for the violations of his constitutional rights by various federal officials. In Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), this Court held that a cause of action for damages exists against a federal official responsible for injury to a constitutionally protected interest. To sustain a Bivens type action, the plaintiff must first demonstrate that his constitutional rights have been violated. Davis v. Passman, 442 U.S. 228, 248 (1979). The Petitioner urges the Court to grant his writ of certiorari because of the grievous errors by the courts below in finding that the Petitioner's arbitrary termination from the Protection

Program violated none of the Petitioner's constitutional rights.

I. The Court of Appeals Has Decided an Important Questions of Federal Law Which Has Not Been, But Should Be, Settled By This Court

A. The Witness Protection Program, which provides the Attorney General of the United States with absolute, unreviewable, discretion to terminate a witness' participation for the exercise of his First Amendment Rights, violates the witness' substantive due process rights under the Fifth Amendment of the United States Constitution.

To state a claim for a violation of one's substantive due process rights under the Fifth Amendment, the complaint must allege [18/] that governmental action

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18/ It must be stressed that the Bivens count, Count IV of the Third Amended Complaint was dismissed for failure to state a cause of action. As such, in a motion to dismiss, and for purposes of this petition, the Court must consider only the allegations in the complaint, and must accept the allegations

violated or impaired a fundamental right explicity or implicity secured by the Constitution or was inconsistent with the concept of ordered liberty. Griswold v. Connecticut, 381 U.S. 479, 499-500 (1965) (Harlan, J., concurring). See also Harris v. McRae, 448 U.S. 297, 312, 100 S.Ct. 2671, 2685 (1980).

The Witness Protection Program was enacted by Congress as a provision of the Organized Crime and Control Act of 1970, Pub.L. 91-452, Title V, §§501-504, 84

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as true. Paul v. Davis, 424 U.S. 693, 720 (1976) (Brennan, J., dissenting); Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), , Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172, 174-75 (1965); Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 126 (1951); Rule 12(b) of the Federal Rules of Civil Procedure provides that "[i]f, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given a reasonable opportun-

Stat. 933, 18 U.S.C. Chap. 223 (1976). The purpose of the program was to "meet society's obligation to protect from underworld vengeance those who meet their duty in giving to society the benefit of their testimony in organized crime cases." S.Rep.No. 91-617, 91st Cong. 2d Sess. 59, 60. In order to meet that obligation, Congress authorized the Attorney General to procure housing facilities and to otherwise provide for the health, safety and welfare of witnesses, potential witnesses, and their families, "whenever, in his judgment, testimony from, or a willingness to

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ity to present all material made pertinent to such a motion by Rule 56." Usually on a motion under Rule 12(b)(6) extraneous material may not be considered if the court excludes it. However when a motion under Rule 12(b) is converted into a summary judgment motion, both parties must be given a reasonable opportunity to submit affidavits and extraneous proofs. Notes of Advisory Committee on Rules of Federal Civil

testify by, such a witness would place his life or person, or the life or person of a member of his family or household, in jeopardy." Pub.L. 91-452, Title V, §502, 84 Stat. 933. However, Congress further provided that any person who has availed himself of an offer by the Attorney General to use such facilities may continue to use such facilities for as long as the Attorney General determines the jeopardy to his life or person continues. Id.

The Fifth Circuit Court of Appeals in its decision below interpreted section 502 to give the Attorney General broad authority and discretion to determine not

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Procedure - Rule 12(b). It is not clear whether the district court permitted the inclusion of extraneous material in the motion to dismiss, however, if it did, the Petitioner was never given an opportunity to submit affidavits or extraneous proofs to negate those extraneous materials offered by the Respondents and considered by both the district court and the Fifth Circuit.

only who should be offered the protection of the Program, but the length of time the facilities should be available. 666 F.2d at 962, 963. The court went on to state that the Witness Protection Program does not create a right to protection and if the Attorney General does not provide protective facilities, "the witness is protected to the same extent as other Americans called as witnesses." 666 F.2d at 963.

The Fifth Circuit's interpretation of the Attorney General's authority contains two fallacies. The appellate court in reaching its conclusion that the Attorney General has broad authority to terminate a witness' participation in the Program, ignores the plain language of the legislation that the witness "may continue to use such facilities for as long as the Attorney General determines

the jeopardy to his life or person continues. The Attorney General's discretion to terminate a witness' participation is qualified as to only those times when the Attorney General determines that the witness' life is no longer in jeopardy. Furthermore, the notion that if a witness who is to testify against organized crime is not provided with protective facilities, he is protected to the same extent as any other witness, such observation by the Fifth Circuit fails to comprehend the purpose of the Witness Protection Program. The Program was initiated at the request of the Department of Justice, which was intensifying its efforts against organized crime. There was great concern over the terror tactics employed by organized crime to silence witnesses. Hearings Before Subcommittee No.5, H.R.

Judiciary Committee, 91st Congress, 2d. Sess., 164-165. (comments of Justice Department). Congress recognized that organized crime witnesses could not be protected like any other witness, and that if witnesses have a duty to give society the benefit of their testimony, then society has a duty to offer those witnesses protection. 116 Cong.Rec.S. 584, 589 (January 21, 1970) (comments of Sen. McClellan).

However, if the Fifth Circuit's interpretation of Section 502 is upheld, then it would allow the Attorney General or his delegate to infringe on a witness' constitutional rights by conditioning entry into the Program on the witness' relinquishing constitutional rights they would otherwise enjoy, a premise that has been unequivocally rejected in numerous decisions of this Court. See, e.g.,

Pickering v. Board of Education, 391 U.S. 563, 568 (1968); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Sherbert v. Verner, 374 U.S. 378, 404 (1963). In the instant case, the Petitioner has alleged that the Attorney General has impinged upon his constitutional right of freedom of speech, by arbitrarily terminating him from the Program because of the Petitioner's choosing to exercise that constitutional right.

Furthermore, The Fifth Circuit's attempt to characterize the Witness Protection Program as an act of Congress conferring a "benefit", rather than a "right", does not immunize it from scrutiny under the Fifth Amendment. Richardson v. Belcher, 404 U.S. 78, 81 (1971). Liberties of speech and expression may not be infringed by the denial of or placing of conditions upon a

benefit or privilege. See, e.g., Sherbert v. Verner, 374 U.S. 398, 404 (1963).

Assuming arguendo that even if the Petitioner's participation in the Program is not constitutionally mandated, [19] once the government decided to place the Petitioner on the Program, then the manner in which the government dispenses the benefits under the Program becomes subject to constitutional limitations. See, Maher v. Roe, 432 U.S. 464, 469-70 (1977). Petitioner asserts that the interest of a protected witness under the Witness Protection Program is of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause. See, e.g. Richardson v. Belcher,

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19/ Garcia v. United States, 666 F.2d 960, 963 (1982).

404 U.S. 78, 81 (1971). The Fifth Circuit in the instant case held that the actions of the Marshal's Service in discharging the Petitioner from the Program were not arbitrary because the Petitioner, by speaking to the press, had revealed his identity and location, therefore rendering the Program's protection ineffective. Unfortunately, these findings by the Fifth Circuit were not among the allegations of the Petitioner's complaint and therefore cannot be used to justify the court's holding that the Marshal's Service's actions were not arbitrary. 20/ The Petitioner alleged in his complaint only that he was discharged because he had spoken to the press about conditions on the Program. Nowhere in

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20/ Additionally, these observations were incorrect. Petitioner's new identity was never revealed to the news media in May, 1975 nor was Petitioner's place of residence (meaning the city and state) disclosed.

the complaint does it mention that the Petitioner endangered himself by revealing his identity and location. Therefore, the Petitioner has stated a cause of action for the violation of his substantive due process rights under the Fifth Amendment.

B. The termination of a witness from participation in the United State's Marshal's Witness Protection Program by the Attorney General and his delegates without notice and an opportunity to be heard violated the witness' procedural due process rights under the Fifth Amendment of the United States Constitution.

Petitioner alleged in his Third Amended Complaint that his procedural due process rights were violated by the government when he was terminated from the Program without notice and an opportunity to be heard. To allege a cause of action for the violation of his procedural due process rights, the

Petitioner must show that he was deprived of a protected liberty or property interest encompassed in the Due Process Clause of the Fifth Amendment. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 569-70 (1972). The Fifth Circuit held in the instant case that there was no statutory or contractual entitlement to continued participation in the Program, nor was there any cognizable liberty interest involved. Therefore, there was no requirement for notice or a hearing. 666 F.2d at 964.

> "Liberty and property are broad and majestic terms. They are among the [g]reat (constitutional) concepts ... purposefully left to gather meaning from experience ... They relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged." Board of Regents of State Colleges v. Roth, 408 U.S. 564, 571 (1972) quoting National Mutual Insurance Co. v. Tidewater Transfer Co., 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting).

Petitioner asserts that the Fifth Circuit, in concluding that his procedural due process rights were not violated by his termination without notice or a hearing, erroneously limited the meaning of the words "liberty" and "property" in the Due Process Clause, contrary to the numerous decisions of this Court.

To have a property interest in a benefit, a person must have a legitimate claim of entitlement to it. Property interests are not created by the Constitution. They are created and their dimensions defined by existing rules or understandings that stem from an independent source - such as state or federal laws, which are rules or understandings, that serve certain benefits and that support claims of entitlement to those benefits. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709

(1972), Arnett v. Kennedy, 416 U.S. 134, 165-66 (1974) (Powell, J., concurring). Once a legislature has elected to confer a property interest, it may not constitutionally authorize the deprivation of such an interest, without appropriate procedural safeguards. Arnett v. Kennedy, 416 U.S. 134-167 (1974) (Powell, J., concurring); Goldberg v. Kelly, 397 U.S. 254 (1970); Board of Regents of State Colleges v. Roth, supra.

Petitioner contends that the benefits under the Witness Protection Program, like welfare benefits, are a matter of statutory entitlement for persons qualified to receive them. See Goldberg v. Kelly, 397 U.S. 254, 261-62 (1970). In Goldberg v. Kelly, the issue was what type of procedural due process must be afforded a welfare recipient before his welfare benefits could be

terminated. There was no question that the welfare recipient was entitled to some type of notice and hearing before termination. Petitioner contends that as in Goldberg, once the Attorney General exercised his broad discretion and extended the benefits of the Witness Protection Program to the Petitioner, these benefits could not be terminated without some kind of notice and a hearing.

The Fifth Circuit interpreted the Statute and legislative history of the Witness Protection Program, as only authorizing the Attorney General to provide protection and not to create an entitlement to such protection. Furthermore, the court stated that the last sentence of section 502, which provides that one "availing himself of an offer to use such facilities may continue to use

such facilities for so long as the Attorney General determines the jeopardy to his life or person continues," 21/ was not intended to limit the discretion of the Attorney General, nor create a standard for judicial review. 666 F.2d at 964.

The Petitioner submits that the Fifth Circuit's interpretation of the legislation is unduly limited. As stated, supra at 19, the purpose of the Witness Protection Program was for the government to recognize its "responsibility for protecting its intended witnesses from reprisals where the possibility of such reprisals is clear." 116 Cong. Rec. H. 35292 (October 7, 1970) (comments of Rep. Poff). To implement this purpose, the Attorney General was authorized to provide housing facilities and to other-

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21/ Pub.L.No. 91-452, 84 Stat. 933.

wise provide for the witnesses' health, safety and welfare, as long as was required for the protection of the witnesses. Id. Although, the Attorney General is given the authority to decide who is to be initially offered protection under the Program, this does not necessarily indicate that Congress intended for a witness to be arbitrarily denied a right to such protection. This issue was specifically raised by members of Congress. In response to this inquiry, Assistant Attorney General Henry Peterson stated that although there was no provision to allow a witness to apply to a court to compel protection, there was "case law which recognized the responsibility of a law enforcement authority to protect witnesses and, in its failure to protect witnesses, where injury to the person, property or family of the witness

results, the governmental authority can be held liable." Hearings before Subcommittee No. 5, H.R. Judiciary Committee, 91st Cong., 2d Sess. 181 (comments of Mr. McClary, Attorney General Mitchell, and Asst. Atty. Gens. Wilson and Peterson). Therefore, Congress implicitly recognized that there was a duty on the part of the government to provide protection for threatened witnesses, and because of witnesses entitlement to this protection, failure to do so, could leave the government liable for damages resulting from its failure to protect its witnesses.

Furthermore, Petitioner contends as he did supra, at 22-23, that the last sentence of section 502 does limit the discretion of the Attorney General in terminating a witness from the Program. The broad authority afforded the Attorney

General was meant by Congress to be used by the Attorney General in devising ways to protect government witnesses, for example, the authority is broad enough to allow for relocation of witnesses. 116 Cong. Rec. H. 35292 (October 7, 1970) (comments of Rep. Poff). The legislation affords broad power to the Attorney General to care for witnesses and their families as long as there is jeopardy to the life or person of a witness or a member of his family. 116 Cong. Rec. S.584, 589 (January 21, 1970, (comments of Sen. McClellan) (Emphasis added). Therefore, before the Attorney General can terminate a witness from the Program, while there is still danger to the witness and his family, there must be notice and a hearing on the reasons for the termination.

Petitioner further asserts that his

liberty interests as recognized by the Due Process Clause of the Fifth Amendment were violated by his termination from the Program without notice and a hearing. Liberty, as guaranteed by Due Process clause,

> denotes not merely freedom from bodily restraint but also the right of an individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy these privileges long recognized as essential to the orderly pursuit of happiness by free men.
> Board of Regents of State Colleges v. Roth, 408 U.S. 564, 572 (1972) quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

A person's liberty is equally protected, even when the liberty is a statutory creation of the state. The touchstone of due process is the protection of the individual against arbitrary action of government. Wolff v.

McDonnell, 418 U.S. 539, 558 (1974). The Petitioner submits that when a witness agrees to accept the facilities of the Witness Protection Program his right to "engage in any of the common occupations of life" are severely restricted by the government. 22/ Therefore, once a witness, such as the Petitioner, places his life and his family's life into the hands of the Witness Protection Program, their liberty interests in conducting their lives like any other citizen are protected from the arbitrary actions of the government. The government cannot terminate the Petitioner's interests in

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22/ A witness who is placed on the Witness Protection Program is usually relocated with his family and given a new identity. This abrupt change in lifestyle can lead to serious economic disadvantages as well as lengthy periods of unemployment. See U.S. Department of Justice, Report of the Witness Security Program Review Committee, March 1978 at 34, 37-38. This in turn affects the witnesses decisions on marriage, and raising a family.

liberty that they have extended to the Petitioner, without according him procedural due process, that is, some kind of notice or a hearing.

Therefore, the Petitioner has been deprived of both a liberty and property interest encompassed in the Due Process Clause of the Fifth Amendment, by the Attorney General's arbitrary termination of the Petitioner from the Witness Protection Program without notice or an opportunity to be heard.

C. A participant on the Witness Protection Program may not be arbitrarily terminated from the Program for the exercise of his First Amendment Rights.

The Petitioner contends that he was discharged from the Program in retaliation for exercising his First Amendment rights when he complained of the Program's problems to the press. This

Court has made clear that even though a person has no right to a valuable government benefit and even though the government may deny him the benefit for any number of reasons, "it may not deny a benefit to a person on a basis that infringes his constitutionally protected interests - especially his freedom of speech." Perry v. Sindermann, 408 U.S. 593, 597 (1972). See also Board of Regents of State Colleges v. Roth, 408 U.S. 564, 575, n.14 (1972). If the government could deny a benefit to a person because of his constitutionally protected speech, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to achieve a result indirectly which it could not do directly. Speiser v. Randall, 357 U.S. 513, 526 (1958).

The Fifth Circuit Court of Appeals

in the instant case in determining that the government's termination of the Petitioner from the Witness Protection did violate the First Amendment, made grievous errors in its analysis.

In reviewing the Petitioner's allegations that his First Amendment rights were violated by the termination of his participation in the Program, the court analogized the relationship of the Petitioner, a witness, to the United States Marshal's Service, the implementors of the Witness Protection Program, as one of employee to employer. In Pickering v. Board of Education, 391 U.S. 563 (1968), this Court in an employment contest recognized the need to balance the interests of the government employee as a citizen in commenting on public issues and the interest of the government in promoting the efficiency of its public services. Supra at 568. The Fifth

Circuit in the instant case reasoned that the relationship between the Petitioner and the Program also depended upon a balancing of those interests. The court then held that the Petitioner in publicly critizing the Program had "materially and substantially interfered with the purpose and efficiency of [the] public service [offered by the Program], and this interference outweighed the 'public interest in having free and unhindered debate on matters of public importance.'" 666 F.2d at 965 (citations omitted).

The Petitioner asserts that the relationship between the Petitioner and the Program is not analogous to that of the public employment area. Rather, the relationship is one of citizen in general to the government. The government's interests in regulating the speech of its

employees differ significantly from those it possesses in connection with the regulation of the speech of the citizenry in general. Pickering v. Board of Education, 391 U.S. 563, 568 (1968).

> When we deal with the complex of strands in the web of freedoms which make up free speech, the operation and effect of the method by which speech is sought to be restrained must be subject to close analysis and critical judgment in the light of the particular circumstances to which it is applied. Speiser v. Randall, 357 U.S. 513, 520 (1958)

Furthermore, the right of free speech includes a right to communicate a person's views to any willing listener, including a willing representative of the press for the purpose of publication by a willing publisher. Pell v. Procunier, 417 U.S. 817, 822 (1974).

Petitioner asserts that in balancing the interests in the instant case, the

Fifth Circuit considered allegations that were not part of the Petitioner's Third Amended Complaint, leaving the Petitioner with no means with which to rebut them. Specifically, the appellate court based its finding that the government's interest in providing the protection to witnesses was substantially hindered by the Petitioner's publicly revealing his identity and location. These allegations are nowhere to be found in the Petitioner's complaint. Petitioner simply stated that he complained to various newspapers that the Witness Protection Program was not adequately providing for protected witnesses, and abiding by its agreements. (a-72)-(a-73). The Petitioner did not reveal what his present identity was, nor his present location. 23/ Therefore, the

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23/ In fact, although the newspaper interviews

government's interest in the protection of its witnesses, and the efficiency in which it provides this service is not a sufficiently compelling interest to outweigh the Petitioner's strong First Amendment interest in calling attention to substantial problems in the very Program that was designed to protect his life. As such, the government may not deny him the benefits of the Witness Protection Program on a basis that infringed on his constitutionally protected interest in his freedom of speech.

D. A participant's termination from the Witness Protection Program which is arbitrary and without justifiable basis is an intrusion by the Government on activity involving fundamental rights and is therefore an unwarranted invasion

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took place in Miami, Florida they did not state that the Petitioner was now located in Miami, and although the interview used the Petitioner's real name Emilio Garcia, it did not use his new name that had been legally

of the participant's constitutional right to privacy.

The Petitioner asserts that the withdrawal of protection without any justifiable basis exposed him to the criminal element and was an unwarranted invasion of his constitutional right to privacy. Petitioner recognizes that the Constitution does not contain a specific guarantee of the right to privacy. However, this Court has recognized that the provisions of the Bill of Rights, specifically, the First, Third, Fourth, Fifth and Ninth Amendments provide a penumbra that creates "zones of privacy." Griswold v. Connecticut, 381 U.S. 479, 484 (1965). These fundamental rights include "matters relating to marriage, procreation, family relationships, child

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changed through the Program. Therefore, the Petitioner's identity and location were protected.

rearing and education." Paul v. Davis, 424 U.S. 693, 713 (1976). "The right to privacy consists of two interrelated strands, one is the individual's interest in avoiding disclosure of personal matters and another is the interest in independently making certain kinds of important decisions. Both strands may be understood as aspects of the protection which the privacy right affords to individual autonomy and identity." Whalen v. Roe, 429 U.S. 589, 599-600 (1977). See generally Gerety, Redefining Privacy, 12 Harv.Civ.Rts. - Civ.Lib.L. Rev. 233 (1977). The right to privacy restricts the government's power to regulate or intrude on activity involving fundamental rights. See, e.g., Roe v. Wade, 410 U.S. 113 (1973); Stanley v. Georgia, 394 U.S. 557 (1969).

The Fifth Circuit in the instant

case rejected the Petitioner's allegations of an unwarranted invasion of his constitutional right to privacy by holding that because the Petitioner complained about his termination from the Program, the government was not restricting the Petitioner's activity and therefore the privacy rights limitation on governmental restrictions and intrusions did not apply. 666 F.2d at 965. Furthermore, the court stated that the Petitioner's right to participate in the Program is not a fundamental right entitled to privacy protection. Id.

Petitioner contends as he did supra, at 37-38, that his initial participation in the Program and his subsequent termination, greatly affected matters relating to his marriage, procreation, family relationships, child rearing and education. In addition, his interest in

avoiding disclosure of personal matters was directly affected by his termination from the Program. As alleged in the Third Amended Complaint, upon his termination from the Program the Petitioner was forced into hiding (a-76). This is a restriction on his activities that was a direct result of the Government's withdrawal of protection without any justifiable basis. When the Petitioner agreed to be a witness for the government, he endangered his life and that of his family to an extent beyond that which any other witness might. He was accepted to participate in the Program, and his right to continued participation in the Program was a fundamental right [24/] that is entitled to privacy protection.

24/ See text, supra at 17-26.

II. Although Not Raised By The Court of Appeals, the District Court in Dismissing the Complaint for Failure to State a Cause of Action, Has Decided an Important Question of Federal Law, Which Has Not Been, But Should Be, Settled by This Court.

A. A private cause of action for damages can be implied directly under the Witness Protection Program.

The Petitioner asserts that under the allegations in Count IV of the Third Amended Complaint, he has stated a private cause of action for damages directly under the Witness Protection Program. The Petitioner recognizes that the precise issue of a private cause of action under the Witness Protection Program was not specifically presented before the Fifth Circuit Court of Appeals or in the district court. 25/ However,

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25/ This Court is not precluded from deciding issues that are not presented below. Carlson v. Green, 446 U.S. 14, 100 S.Ct. 1468, 1471 n.2 (1980).

this issue should be presented in the petition for certiorari and decided by this Court because it is an important issue, that was in fact decided against the Petitioner when the Fifth Circuit and the district court dismissed the complaint for failure to state a cause of action.

In Cort v. Ash, 422 U.S. 66 (1975) this Court enunciated four factors that the courts must consider in determining whether a private remedy is implicit in a statute not expressly providing one:

> First, is the plaintiff "one of the class for whose especial benefit the statute was enacted," - that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purpose of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the

> concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law? (citations omitted) Id. at 78.

In Cort v. Ash, the Court reiterated the duty of the courts to be alert to provide such remedies that are necessary to effectuate the congressional purpose of the legislation. 442 U.S. at 84 citing J. I. Case Co. v. Borak, 377 U.S. 426, 433 (1964). Subsequent to the Cort case, this Court has stated that in determining whether a private cause of action should be implied under a statute, the focus must be on "the intent of Congress." Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 639 (1981). See also Middlesex County Sewerage Authority v. National Sea Clammers Assn., 453 U.S. 1, 13 (1981). In determining whether a private cause of action is implicit in federal legislation

when the statute by its terms is silent on that issue, the initial focus must be on the state of the law at the time the legislation was enacted. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, ___U.S.___, ___S.Ct.___, 50 U.S.L.W. 4457 (May 7, 1982).

As stated supra at 19, 32-33, the purpose of the Witness Protection Program, was to provide protection for witnesses and their families who testified in organized crime cases from the possibility of reprisals from organized crime. Congress recognized that the federal government had not previously made adequate provisions for the protection of witnesses. The Witness Protection Program was designed to provide that needed protection for those witnesses who desired it. S.Rep.No. 91-617, 91st Cong., 2d Sess. 59,60 (comments of the

President's Crime Commission). There can be no doubt that the Petitioner is one of the class for whose especial benefit the state was enacted.

Pub.L. 91-452, Title V, §502, 84 Stat. 933, authorizes the Attorney General to provide those protective facilities upon his determination that a witness' life is in jeopardy and that protection is to continue as long as the Attorney General finds that the jeopardy to the witness' life continues. Although the statute is silent as to whether there exists a private cause of action to require that a witness be protected, Petitioner asserts that in considering the state of the law at the time the legislation was passed, as well as the circumstances surrounding its enactment, there was an intent by Congress to make such a remedy available. This Court has

held that "the failure of Congress to expressly consider a private remedy is not inevitably inconsistent with an intent on its part to make such a remedy available. Such an intent may appear implicitly in the language or structure of the statute, or in the circumstances of its enactment." Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis, 441 U.S. 11,18, 100 S.Ct. 242, 246 (1979).

The Petitioner submits that Congress was aware at the time the legislation was passed that the government had a duty and responsibility to protect its witnesses.

> If witnesses have a duty to give to society the benefit of their testimony, then surely society owes to them every protection it can offer. 116 Cong.Rec.S. 584, 589(January 21, 1970) (comments of Sen. McClellan).

It was recognized by Congress, that prior to the passage of the Witness Protection Program, the government had been protecting witnesses. The problem was that the

protection was not sufficient. S.Rep. No. 91-617, 91st Cong., 2d. Sess. 59, 60 (comments of the President's Crime Commission). Furthermore, Congress was aware that "there [was] case law which recognized the responsibility of a law enforcement authority to protect witnesses and, in its failure to protect witnesses, where injury to the person, property, or family of the witness results, the governmental authority can be held liable." Hearings Before Sub-committee No.5, H.R. Judiciary Committee, 91st Cong., 2d. Sess. 181 (comments of Asst. Atty. Gen. Peterson). See also In re Quarles, 158 U.S. 532 (1895) (right of witness to be free from injury, oppression, threats and intimidation); Swanner v. United States, 309 F.Supp. 1183 (M.D.Ala. 1970) (suit by federal witness for injuries and damages

sustained in explosion of dwelling house); Schuster v. City of New York, 5 N.Y. 2d. 75, 180 N.Y.S. 2d., 265, 154 N.E. 2d 534 (1958) (witness for government was murdered).

Petitioner asserts that a private cause of action directly under the Witness Protection Program is consistent with the underlying purpose of the legislative scheme, that is, to provide protection and other compensation for those witnesses who risk their life to perform their duty to give testimony in behalf of the government. Furthermore, a private cause of action by a federal government witness for that protection and compensation is not one traditionally relegated to state law. Therefore, it would not be inappropriate to infer a cause of action based solely on the federal Witness Protection Program.

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should issue to review the judgment of the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Undersigned counsel for Petitioner certifies that service of this Petition for Writ of Certiorari has been made upon counsel for the respondents this date, in accordance with law, by depositing three copies thereof in the United States Mail, postage prepaid, to the following:

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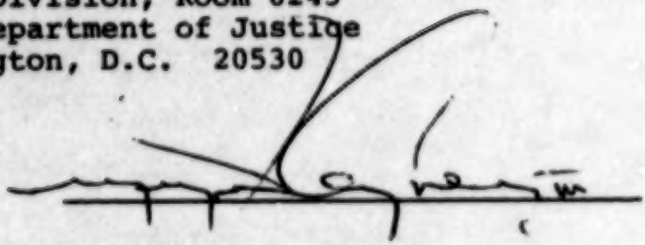

Dated June 3, 1982

APPENDIX A

OPINION

in

Emilio Garcia v. United States of America, et al., 666 F.2d 960 (5th Cir. Unit B February 4, 1982)

Appeal from the United States District Court for the Southern District of Florida

Before RONEY, KRAVITCH and ANDERSON, Circuit Judges.

RONEY, Circuit Judge:

Plaintiff, Emilio Garcia, a drug informer, was given protection under the United States Marshal's Witness Protection Program, established by the Organized Crime Control Act of 1970. Discharged from the Program after giving newspaper interviews, he sued the United States and individual members of the Marshals Service for damages in a Bivens action, asserting the removal of protection had violated several of his

constitutional rights. We affirm the dismissal of his complaint against the individuals of the Marshals Service on the ground that, because of the nature and purpose of the Witness Protection Program, his discharge did not violate substantive or procedural due process, First Amendment or privacy rights, and did not constitute cruel and unusual punishment. Sovereign immunity supports the dismissal of the claim against the United States.

From 1970 to 1974 plaintiff worked for the Bureau of Narcotics and Dangerous Drugs and its successor, the Drug Enforcement Agency ("DEA"), as a "special employee." He infiltrated drug smuggling operations, collected information on their activities, reported this information to DEA officials, and testified in several major drug cases.

In return for his cooperation and in consideration of the personal and potential danger to plaintiff and his family, the officials of the United States Marshals Service offered plaintiff the protection of the Witness Protection Program, which was established as Title V of the Organized Crime Control Act of 1970. Pub.L.No. 91-452, 84 Stat. 933-934, reprinted in 18 U.S.C.A. prec. § 3481 (Supp.1981). Plaintiff voluntarily accepted the offer and became a participant in the Program.

Discussions with plaintiff concerning the Witness Protection Program and its problems appeared in newspaper articles on May 12 and 14, 19[illegible]. Several more articles followed over the next four months. In these articles plaintiff revealed his presence in Miami and his identity as Emilio Garcia. In fact, the

paper published plaintiff's picture. After this occurred, plaintiff was discharged from the Program. He was readmitted and discharged from the Program three times thereafter. Plaintiff asserts several of his constitutional rights were violated when he was removed from the Program in spite of the Government's obligation to him and with knowledge of threats to his life and danger to his family. Specifically, plaintiff alleges the termination was in violation of his Fifth Amendment procedural and substantive due process rights; in violation of the exercise of his First Amendment rights; in violation of his right to privacy from Government invasion; and in violation of his Eighth Amendment right to be free from cruel and inhuman punishment.

The question on this appeal is

whether the complaint alleging a Bivens type action was properly dismissed by the district court. In Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), the Supreme Court upheld a cause of action for damages against a federal official responsible for injury to a constitutionally protected interest. In order to sustain a Bivens type action, the plaintiff must first demonstrate that his constitutional rights have been violated. Davis v. Passman, 442 U.S. 228, 248, 99 S.Ct. 2264, 2278, 60 L.Ed.2d 846 (1979). We must, therefore, examine the Witness Protection Program and plaintiff's allegations and determine to what extent his constitutional rights were involved and whether they were violated by his discharge.

Witness Protection Program

The Witness Protection Program is essentially an authorization for the Government to extend benefits in the form of protective facilities and other protection. The statute creating the Program provides that the Attorney General is authorized to procure protected facilities and otherwise offer to provide for the health, safety and welfare of witnesses against organized crime "whenever, in his judgment, testimony from, or a willingness to testify by, such a witness would place his life or person, or the life or person of a member of his family or household, in jeopardy." Pub.L.No. 91-452, 84 Stat. 933. Any person availing himself of an offer by the Attorney General to use such facilities may continue to use such facilities for as long as the Attorney

General determines the jeopardy to his life or person continues. This provision gives the Attorney General broad authority to determine the particular facilities to be afforded and the length of time the facilities should be available. One cannot receive protection simply on demand.

The statute was enacted in response to a felt moral obligation to repay citizens who risk life by carrying out their duty as citizens to testify. It merely authorizes the provision of protection at the discretion of the Attorney General. The Attorney General has delegated his power over the Program to the United States Marshals Service. 28 C.F.R. § 0.111(c) (1980).

At present, the Marshals Service admits unincarcerated witnesses into the Program only after execution of

"Memoranda of Understanding." Once a witness signs a Memorandum of Understanding, the Marshals Service assumes responsibility for his physical safety. The Service may either assign Marshals to guard the witness or give the witness a new identity and relocate him to another part of the country. If the witness is relocated, the Marshals may provide him with subsistence payments.

At the time plaintiff accepted protection under the Program, he and the Marshals Service entered into an oral agreement setting forth the conditions of his participation. The Marshals Service explicitly conditioned its offer of protection on plaintiff's "staying away from criminals, people that knew him and staying out of trouble." This restriction was imposed to ensure plaintiff's protection by his staying out of the

public eye and away from those who threaten him. By allowing his picture, name and whereabouts to appear in the paper, his actions exposed him to those from whom the Marshals Service was attempting to protect him. Plaintiff admitted he was aware of the conditions of his continuance in the Program at the time of his actions.

Due Process Claims

Plaintiff claims he has a right to protection under the Program. His termination from the Program without just cause and without prior notice and a hearing, he argues, violates his substantive and procedural due process rights.

The Witness Protection Program is essentially an authorization for the Government to extend benefits in the form

of protective facilities and other protection. It does not create a right to protection. If the Attorney General does not provide protective facilities, the witness is still protected to the same extent as other Americans called as witnesses.

Although plaintiff may be eligible to receive or to continue to receive the benefits of the Program, his participation in the Program is not constitutionally mandated. Cf. Harris v. McRae, 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980); Richardson v. Belcher, 404 U.S. 78, 92 S.Ct. 254, 30 L.Ed.2d 231 (1971). The Constitution does not require the establishment of the Witness Protection Program. In establishing a program to provide protection for witnesses against organized crime, Congress chose to grant to the Attorney General broad authority

and discretion. With organized crime's feared disruption of the judicial system and the need of quick decisions without many people being involved, the Program bears a reasonable relation to the congressional purpose. See generally United States v. Coastal States Crude Gathering Co., 643 F.2d 1125, 1127-28 (5th Cir. 1981).

The Marshals Service discharged plaintiff from the Program after he had endangered himself by revealing his identity and location publicly. The Service's actions were not arbitrary and were based on sufficient cause when plaintiff's own actions rendered the Program's protection ineffective. Plaintiff's substantive due process rights are not involved in this case.

Plaintiff's procedural due process claim is that he was terminated without

notice and an opportunity to be heard. To establish such a claim, a plaintiff must show he has been deprived of a protected liberty or property interest encompassed in the Due Process Clause of the Fifth Amendment. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 569-70, 92 S.Ct. 2701, 2705, 33 L.Ed.2d 548 (1972).

A property interest is an entitlement to a Government benefit arising out of law or contract. It is not created by the Constitution. Roth, 408 U.S. at 577, 92 S.Ct. at 2709. The statute and legislative history repeatedly speaks of the legislation as "authorizing" the Attorney General to provide protection; it does not refer to a witness' entitlement to such protection. See, e.g., H.R. Rep.No.91-1549, 91st Cong., 2d Sess., reprinted in [1970] U.S.Code Cong. & Ad.

News 4007, 4008, 4024. The history reveals that the Program gives "broad authority" to the Attorney General over substantive decisions.

Plaintiff points to the last sentence of section 502 which provides that one "availing himself of an offer to use such facilities may continue to use such facilities for so long as the Attorney General determines the jeopardy to his life or person continues." Pub.L. No. 91-452, 84 Stat. 933. This language, plaintiff asserts, creates an entitlement to continued protection. This provision was not intended to limit the discretion of the Attorney General. Rather, the phrase was intended to ensure that protection extended beyond the time of trial. S.Rep.No.91-617, 91st Cong., 1st Sess. 58-59; 116 Cong.Rec.H. 35292 (Oct. 7, 1970) (comments of Rep. Poff). Nor

was it intended to create a standard for judicial review. On the whole, the statutory scheme indicates that the Attorney General has discretion on an ongoing basis to decide when, to whom, and for how long to provide protective facilities.

The liberty protected by the Due Process Clause affords protection against unwarranted Government interference with freedom of choice in the context of certain personal decisions. It does not confer an entitlement to protection. See Harris v. McRae, 448 U.S. 297, 317-318, 100 S.Ct. 2671, 2688-89, 65 L.Ed.2d 784 (1980). Here, plaintiff was not obligated to participate in the Program. It was a voluntary decision. Further, plaintiff was removed from a Government program which vested in the Attorney General the authority to determine who

would be offered protection and the length of time protection under the program would be extended. The statute does not confer on participants the right to determine how long participation will last. Plaintiff's removal, therefore, does not amount to an unwarranted Government interference on his freedom of choice.

There is no statutory or contractual entitlement to continued participation in the Program. There is not any cognizable liberty interest involved in plaintiff's claim. Therefore, there is no requirement for notice or a hearing.

First Amendment Rights

Plaintiff contends that defendants discharged him from the Program in retaliation for exercising his First Amendment rights when he complained of

the Program's problems in newspaper articles.

The Supreme Court has held that, in the context of certain relationships with the Government, the contours of an individual's First Amendment rights are affected by the situation. See Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969) (students' First Amendment rights limited by school environment); Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968) (employment relationship affects contours of exercise of free speech). In Pickering, the Supreme Court recognized the need to arrive at a balance in the employment context between the interests of the Government employee as a citizen in commenting on public issues and the

interest of the state in promoting the efficiency of its public services. Id. at 568, 88 S.Ct. at 1734.

The relationship in the present case also depends upon a balancing of interests. The plaintiff was voluntarily receiving protection from a Government program. The effectiveness and efficiency of that program is affected by the conduct of its individual participants. The Program's purpose is to provide protection. Anonymity is a key to its success. The purpose is defeated if those receiving protection speak in a way which make their identities and locations known thereby rendering the offered protection ineffective.

Plaintiff's interest in calling attention to perceived problems with the Program was substantial. Plaintiff's life was directly affected by the

Program's operation. Still plaintiff could have criticized the Program without identifying himself and his location publicly. His actions increased the risk of danger to himself and his family and required increased protection for himself and his family, making additional demands on the Program's resources.

The Government did not violate the First Amendment when it terminated plaintiff from the Program. Plaintiff had materially and substantially interfered with the purpose and efficiency of this public service, and this interference outweighed the "public interest in having free and unhindered debate on matters of public importance." Pickering, 391 U.S. at 573, 88 S.Ct. at 1737; Porter v. Califano, 592 F.2d 770, 773 (5th Cir. 1979).

Privacy Rights

Plaintiff contends that the withdrawal of protection without any justifiable basis exposed him to the criminal element and was an unwarranted invasion of his constitutional right to privacy.

The "right to privacy" is not found in any specific guarantee of the Constitution. Instead, the Court has recognized that "zones of privacy" may be created by certain specific constitutional guarantees or fundamental rights. Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976). These fundamental rights include "matters relating to marriage, procreation, contraception, family relationships, child rearing and education." Id. at 713, 96 S.Ct. at 1166. The right to

privacy restricts the Government's power to regulate or intrude on activity involving fundamental rights. See, e.g., Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969); Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965).

Plaintiff's privacy claim fails for two reasons. First plaintiff complains about his discharge. By removing plaintiff from the Program, the Government was not restricting his activity. Since the privacy right limits governmental restrictions and intrusions, it is not applicable in this instance. Second, plaintiff's right to participate in the Program is not a constitutional or fundamental right entitled to privacy protection.

Cruel and Inhuman Punishment

Plaintiff further argues that his right to be free from cruel and inhuman punishment was violated by defendants' callous discharge of plaintiff. The facts of this case simply cannot support this Eighth Amendment claim.

In Ingraham v. Wright, 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977), the Supreme Court examined the cruel and unusual punishment clause of the Eighth Amendment. In finding the constitutional prohibition against cruel and unusual punishment inapplicable in school paddlings, the Court held that this provision of the Eighth Amendment was designed to protect those convicted of crimes. Id. at 664, 97 S.Ct. at 1408. Here, plaintiff was not convicted of a crime. His discharge from the Program was a civil matter. It does not

implicate Eighth Amendment protections.

Bivens Action

Plaintiff contends that a Bivens action may only be defeated in two situations. The first is when defendants demonstrate "special factors counselling hesitation in the absence of affirmative action by Congress." Bivens, 403 U.S. at 396, 91 S.Ct. at 2004; Davis v. Passman, 442 U.S. at 245, 99 S.Ct. at 2276. The second is when defendants show that Congress has provided an equally effective alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution. See Bivens, 403 U.S. at 397, 91 S.Ct. at 2005; Davis v. Passman, 442 U.S. at 245-47, 99 S.Ct. at 2276-78. Neither of these situations is present here according to the plaintiff.

Concededly, these two defenses are available to defeat a Bivens action when a valid Bivens claim is found to exist. Plaintiff, however, must first establish a violation of a valid constitutional claim. As our examination of plaintiff's alleged constitutional violations indicates, plaintiff failed to do so in this case.

U.S. Immunity

In addition to suing the individual marshals, plaintiff sues the United States Government in this Bivens action. Plaintiff reads Title V of the Organized Crime Control Act to bar the Attorney General from expelling witnesses from the Program unless he first determines they are no longer in danger. Plaintiff, however, has not satisfied the jurisdictional prerequisites for suit

against the Government.

An individual cannot sue the United States without its consent. Doe v. Civiletti, 635 F.2d 88, 93 (2d Cir. 1980). "[I]t has been said, ... that a waiver of the traditional sovereign immunity 'cannot be implied but must be unequivocally expressed.'" United States v. Testan, 424 U.S. 392, 399, 96 S.Ct. 948, 953, 47 L.Ed.2d 114 (1976), quoting United States v. King, 395 U.S. 1, 4, 89 S.Ct. 1501, 1502, 23 L.Ed.2d 52 (1969); Soriano v. United States, 352 U.S. 270, 276, 77 S.Ct. 269, 273, 1 L.Ed.2d 306 (1957).

The complaint alleges jurisdiction under 28 U.S.C.A. § 1331 and looks directly to the Constitution for its substantive basis. This Court and others have held that 28 U.S.C.A. § 1331 is not a waiver of sovereign immunity. A. L.

Rowman & Son, General Contractors, Inc. v. HUD, 611 F.2d 997, 1000 (5th Cir. 1980); Beale v. Blount, 461 F.2d 1133, 1138 (5th Cir. 1972); Doe v. Civiletti, 635 F.2d 88, 94 (2d Cir. 1980). The Constitution does not waive the Government's sovereign immunity in a suit for damages. See Jaffee v. United States, 592 F.2d 712, 715-18 (3d Cir.), cert. denied, 441 U.S. 961, 99 S.Ct. 2406, 60 L.Ed.2d 1066 (1979).

An immunity waiver, if it exists at all, must be found in the statute giving rise to the cause of action. Title V on which plaintiff relies does not suggest that Congress meant to waive the Government's immunity from suit. It does not imply, much less "unequivocally express," that the statute was intended to expand the Government's amenability to suit. H.Rep.No.91-1549, 91st Cong., 2d

Sess. reprinted in [1970] U.S.Code Cong. & Ad.News 4007, 4024; S.Rep.No.91-617, 91st Cong., 1st Sess. 59-60 (1969).

This suit for damages against the United States based on the Constitution is not contemplated by Bivens and its progeny. The United States is immune from suit.

For the foregoing reasons, the district court's dismissal of plaintiff's complaint is affirmed.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 75-1309-CIV-JAG

ORDER

EMILIO GARCIA,
Plaintiff,
vs.
THE UNITED STATES OF AMERICA,
Defendants.

THIS CAUSE has come before the Court upon the following motions filed on behalf of the Defendants:

1] Motion to Dismiss Counts II, IV and V; and

2] Motion to Strike Demand for Jury & Attorneys Fee.

The Court has considered the record, and being otherwise duly advised, it is

ORDERED AND ADJUDGED as follows:

1] The Defendants' Motions to Dismiss Counts II & V are hereby DENIED.

2] The Defendants' Motion to Dismiss Count IV are hereby GRANTED and Count IV is hereby DISMISSED. The Plaintiff's remedy for adverse administrative actions is controlled by the Administrative Procedures, 5 U.S.C. 701 et seq.; and, second, Count IV fails to state a claim for which relief can be granted.

3] The Defendants' Motions to Strike the Demand for Jury and for Attorney's fees are hereby GRANTED and said demands are hereby STRICKEN.

DONE AND ORDERED in chambers at Fort Lauderdale, Florida this 22nd day of June, 1979.

/S/
HONORABLE JOSE A. GONZALEZ, JR.
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 75-1309-CIV-JAG

ORDER

EMILIO GARCIA,
Plaintiff,
vs.
THE UNITED STATES OF AMERICA,
Defendants.

THIS CAUSE has come before the Court for review upon the Plaintiff's Motion for Reconsideration filed on August 3, 1979. The Court has considered the record, and being otherwise duly advised, it is

ORDERED AND ADJUDGED that the Plaintiff's Motion for Reconsideration be, and the same hereby is, DENIED.

DONE AND ORDERED in chambers at Fort Lauderdale, Florida this 9th day of August, 1979.

/S/
HONORABLE JOSE A. GONZALEZ, JR.
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 75-1309-Civ-JAG

THIRD AMENDED COMPLAINT

EMILIO GARCIA,
Plaintiff,
vs.
UNITED STATES OF AMERICA; GRIFFIN BELL, Attorney General, United States Department of Justice; WILLIAM E. HALL, Director, United States Department of Justice; DONALD D.FORSHT, United States Marshal for the Southern District of Florida; FRANK W. NOE, Deputy United States Marshal; RAYMOND C. POPE, Deputy United States Marshal; JOHN W. CAMERON, Deputy United States Marshal; each person is individually and officially named,
Defendants.

COMES NOW Emilio Garcia, plaintiff in the above-captioned matter, and amends his original complaint in the following several particulars, to-wit:

A.

COMES NOW the plaintiff and amends the complaint in this action so that

paragraphs 1-10 will read as follows:

Plaintiff, Emilio Garcia, sues the defendant and alleges as follows:

1. The jurisdiction of this court is evoked pursuant to Title 28, United States Code, Sections 1331, 1346(a)(2), 1361 and 2201.

2. Plaintiff is a resident of Dade County, Florida, and up until May, 1975, was a witness entitled to and afforded protection by the defendants under the Witness Protection Program.

3. Defendant United States of America is a sovereign government which has withdrawn its immunity to be sued pursuant to 28, U.S.C., Section 1346(a)(2).

4. Defendant Edward H. Levi is the former Attorney General and former superior officer of the United States Department of Justice at the time

plaintiff was discharged from the Witness Protection Program in May, 1975. Within the Department of Justice is the Drug Enforcement Agency, by whom plaintiff was employed.

5. Defendant Griffin Bell is the current Attorney General and superior officer of the United States Department of Justice.

6. Defendant Wayne B. Colburn is the former Director of the United States Marshal Service, an agency of the United States Department of Justice, and had overall supervision of the Witness Protection Program, from which plaintiff was wrongfully and illegally removed in May, 1975.

7. Defendant William E. Hall is the current Director of the United States Marshal Service, an agency of the United States Department of Justice and has

overall supervision of the Witness Protection Program.

8. Defendant Donald D. Forsht is the United States Marshal for the Southern District of Florida, and had immediate supervision of plaintiff's welfare under the Witness Protection Program. He, along with other officials known and unknown, was responsible for plaintiff being dropped from the Witness Protection Program.

9. Defendant Frank W. Noe is a Deputy United States Marshal for the United States Marshal Service in the State of Florida and directly responsible for the plaintiff's safety, care and overall welfare under the Witness Protection Program. He, along with others known and unknown, was responsible for plaintiff being dropped from the Witness Protection Program.

9a. Defendant John W. Cameron was the Associate Director of Witness Security Program, United States Marshal service, Falls Church, Virginia and had intermediate supervision of the Witness Protection Program in 1975 and 1976. Defendant Cameron, along with Raymond Pope, Donald Forsht and Frank Noe, made the collective decision to terminate plaintiff from the Program in May of 1975.

9b. Defendant Raymond Pope was a deputy United States Marshal, with the Witness Protection Program and an employee of the United States Marshal Service in 1975 and 1976. Defendant Pope, along with defendants Noe, Forsht and Cameron collectively decided to terminate the plaintiff from the Witness Protection Program in May, 1975.

10. Venue is proper in the Southern

District of Florida, pursuant to 28 U.S.C., Section 1391(e).

B.

COMES NOW the plaintiff, and adds Count V of the complaint, which count seeks injunctive relief.

COUNT I

11. Plaintiff realleges and makes a part hereon, all of the allegations in paragraphs two, three and nine.

12. The jurisdiction of this court is evoked pursuant to Title 28, U.S.C., Section 1346(a)(2), and the amount in controversy under Count I, pursuant to Section 1346(a)(2), does not exceed ten thousand ($10,000.00) dollars.

13. The United States of America is the only party defendant that plaintiff seeks relief against under Count I.

14. The Drug Enforcement Administration is an agency of the United

States government.

15. Plaintiff worked for the Bureau of Narcotics and Dangerous Drugs (BNDD) and its successor, the Drug Enforcement Agency, (hereinafter to be referred to as "DEA") from January 20, 1970, until November, 1973 as a 'special employee' and witness for the government in numerous criminal cases against major drug traffickers.

16. On or about September, 1972, in the City of New York, State of New York, plaintiff entered into an oral agreement with agents of the DEA wherein the DEA, on its part, agreed to hire plaintiff for one year, to-wit, plaintiff was to travel to Guadalajara, Mexico, and once there provide information to the DEA concerning illegal drug traffic between Mexico and the United States. These said agents represented that they had the authority

to bind the DEA to said agreement. The DEA agreed to pay plaintiff $1,080.00 a month salary for one year, in addition to monetary rewards for information provided by plaintiff.

17. In consideration of the DEA's promise, plaintiff on his part agreed to travel to Guadalajara, Mexico, and to provide information to the DEA concerning illegal drug traffic between Mexico and the United States.

18. Plaintiff on his part has duly performed all the terms and conditions of said agreement. Plaintiff traveled to Mexico on or about September, 1972. While in Mexico, plaintiff uncovered information linking high Mexican government officials with illegal drug traffic between Mexico and the United States and provided this information to the DEA. Plaintiff was informed by the DEA that

United States officials were fearful that the exposure of high Mexican government officials connected with illegal drug traffic between Mexico and the United States might adversely affect the governmental relationship between the two countries. Plaintiff was ordered to travel back to the United States by the DEA after plaintiff was in Mexico for a period of only three months.

19. The DEA has failed and refused to perform said agreement in that the DEA will not pay plaintiff the agreed upon salary for the remaining nine months of the contract that the DEA made with plaintiff. Plaintiff also was denied the opportunity to continue to provide information concerning illegal drug traffic between Mexico and the United States for which he would be entitled to monetary rewards by the DEA.

20. On or about September, 1973, in the city of Weekawken, New Jersey, plaintiff entered into an agreement with Howard Safir of the DEA wherein the DEA on its part agreed to hire plaintiff for a period of six months to provide information concerning illegal drug traffickers in California and for plaintiff to testify for the United States in legal proceedings instituted by the government against persons alleged to have participated in organized criminal activity. The DEA further agreed to pay plaintiff $300.00 a week for a period of six months beginning in September, 1973 until April, 1974.

21. In consideration of DEA's promise, plaintiff on his part agreed to provide information to the DEA concerning illegal drug traffickers and to testify for the United States in legal proceed-

ings instituted by the government against persons alleged to have participated in organized criminal activity.

22. Plaintiff on his part has duly performed all the terms and conditions of said agreement.

23. In November, 1973, plaintiff was injured in an automobile accident while working for the DEA. Plaintiff was hospitalized for eleven days, but upon leaving the hospital plaintiff has been ready, willing and able to perform and continue to provide, according to said agreement between plaintiff and DEA, information to the DEA concerning illegal drug traffickers and testifying for the United States in legal proceedings instituted by the government against persons alleged to have participated in organized criminal activity.

24. The DEA has failed and refused

to perform said agreement in that the DEA refused to continue to pay plaintiff the agreed upon salary of $300.00 per week for six months after November, 1973.

25. While in Miami, Florida as a witness for defendant United States of America in January, 1974, plaintiff was again injured in an automobile accident and as a result, suffers from permanent disability.

26. Plaintiff in good faith has testified for the government against persons connected with illegal drug trafficking approximately twenty-five times from 1970 through 1974 with the resulting convictions of approximately three hundred persons.

27. Plaintiff has received numerous threats on his life from persons involved in illegal drug trafficking.

28. The Attorney General of the

United States is responsible for providing for the health, safety and welfare of witnesses and their families under Public Law 91-452, Title V, Section 501-504. (See Title 18, U.S.C., Chapter 223, Comment.)

29. On or about January, 1974, at the city of Hollywood, Los Angeles County, California, plaintiff met with officers of the Marshal Services and orally agreed to continue to testify for the United States in legal proceedings instituted by the government against persons alleged to have participated in organized criminal activity. In consideration of plaintiff's promise, plaintiff was to be placed under the United States Marshal's Witness Protection Program (hereinafter referred to as "Program"), Public Law 91-452, in January, 1974, and to be provided with:

(a) Free medical and dental care for himself and his family.

(b) That officers of the United States Marshal's Service would have plaintiff's status changed from refugee to permanent resident.

(c) That plaintiff and his family would be relocated in another city and given a new identity so that plaintiff and his family would be able to begin a new life without fear for their own safety.

(d) That officials of the United States Marshal Service would work with plaintiff to find plaintiff a job commensurate with plaintiff's new identity.

(e) That plaintiff would be paid the $890.00 per month subsistence money allotted to plaintiff under the Program for at least six months after plaintiff

concluded all testimony for the United States, but probably extending for a longer period of time due to the injuries plaintiff received in an automobile accident occurring in November, 1973 and January, 1974, while plaintiff was employed by the DEA.

(f) Protection for the plaintiff and his family would continue until the United States was certain that plaintiff's life would no longer be in danger.

30. Plaintiff has received threats and two attempts upon his life occurring on or about January 18, 1975, and in about April of 1975. In the April, 1975 attempt on his life, plaintiff telephoned for police assistance to escort his wife and himself safely out of the building where the attempt on plaintiff's life had occurred.

31. Plaintiff was wrongfully, intentionally and maliciously abruptly dropped from the Witness Protection Program on or about May 15, 1975, and was intentionally kept off the Witness Protection Program until October, 1975, a period of approximately five (5) months. During said period the plaintiff did not receive the $890.00 per month subsistence money allotted to the plaintiff under the Program or any part thereof. Additionally, both plaintiff and his wife had needed medical treatment during the past year, but agents of defendant United States of America have refused to either pay for said medical treatment or provide medical treatment.

32. Plaintiff has faithfully performed all of the duties of a cooperating individual and a witness to the extent he was permitted to do so by

employees of the defendant, United States of America, and at all times has been ready, willing and able to testify for the defendant United States of America in legal proceedings instituted by the government against persons alleged to have participated in organized criminal activity. Employees of defendant United States of America, contrary to the terms and conditions of said agreement, have failed to provide for the health, safety and welfare of the plaintiff and his family in that protection is no longer provided, nor medical and dental care, nor subsistence monies.

WHEREFORE, by reason of the breach by defendants, plaintiff has sustained damages in the amount not exceeding ten thousand ($10,000.00) dollars; further, plaintiff necessarily incurred legal fees by reason of the above action and prays

that said amounts be reimbursed to him by the defendants; further, plaintiff prays for suit costs and reasonable attorney's fees; and a trial by jury on all issues so triable; further, plaintiff renounces his claim to any damages awardable under Count I which, added together, total more than ten thousand ($10,000.00) dollars.

COUNT II

33. Plaintiff realleges and makes a part hereof, all of the allegations contained in paragraphs one through thirty-two omitting however, paragraphs four, six and ten.

34. This is an action for a declaratory judgment pursuant to 28 U.S.C., Section 2201, for the purpose of determining questions of an actual controversy between the parties.

35. Plaintiff has been a witness for the United States in legal proceed-

ings instituted against persons alleged to have participated in an organized criminal activity and plaintiff was informed that he was intended to be called as a government witness in future actions instituted against persons alleged to have participated in an organized criminal activity.

36. Griffin Bell, the Attorney General of the United States, is responsible for providing for the health, safety and welfare of witnesses and their families and persons intended to be called as government witnesses and their families under Public Law 91-452.

37. William E. Hall, the Director of the United States Marshal Service, has been delegated the overall responsibility for supervision of said Witness Protection Program.

38. Plaintiff was placed under the Program, a provision of the Organized Crime and Control Act of 1970, Public Law 91-452, in January, 1974.

39. Plaintiff had made an agreement with defendants, United States, and the United States Marshal Service that under the Program, plaintiff would be provided with:

(a) Free medical and dental care for himself and his family.

(b) That officers of the United States Marshal's Service would try to have plaintiff's status changed from refugee to permanent resident.

(c) That plaintiff and his family would be relocated in another city and given a new identity so that plaintiff and his family would be able to begin a new life without fear for their own safety.

(d) That officials in the United States Marshal Service would work with plaintiff to find plaintiff a job commensurate with plaintiff's new identity.

(e) That plaintiff would be paid the $890.00 subsistence money allotted to plaintiff under the United States Marshal's Witness Protection Program for at least six months after plaintiff concluded all testimony for the United States, but probably longer due to the injuries plaintiff received in an accident occurring in November, 1973 while plaintiff was employed by the DEA.

(f) Protection would be provided for the plaintiff and his family until the United States was certain that plaintiff's life would no longer be in danger.

40. Thereafter, on or abcut October

16, 1975, the plaintiff was re-installed on the Witness Protection Program.

41. In or about January or February, 1976 the plaintiff was again informed by officials of the United States Marshal's Service that he had been terminated from the Witness Protection Program.

42. In or about late March, 1976 the plaintiff, through efforts of his attorney and as a result of a meeting in Washington, D.C., with United States Department of Justice officials and United States Marshal Service officials, was able to have the plaintiff again placed on the Witness Protection Program.

43. In September or October, 1976, plaintiff's attorney learned that the United States Marshal's Service and United States Department of Justice officials were aware of current informa-

tion demonstrating that actual threats to the life of plaintiff and his family had been made as a result of plaintiff's cooperation with the United States Department of Justice and as a result of plaintiff's testimony on behalf of the defendant, United States of America, in federal district courts throughout the United States.

44. In August, 1977, plaintiff's attorney spoke with Mervyn L. Ames, Esquire, Attorney for Defense, United States of America and was informed the plaintiff and his family would remain on the Witness Protection Program until, at a minimum, the termination of his lawsuit.

45. In or about September or October, 1977 and March, 1978 plaintiff's attorney had conversations with Gerald Auerbach, Attorney for Defense, Wayne

Colburn and William E. Hall, the former and current Directors of the United States Marshal Service and Mr. Auerbach stated that plaintiff could not be continued on the Witness Protection Program for more than three months. The United States Marshal Service since September, 1977 has taken the position that plaintiff can be terminated from the Program at any time, whether threats to the safety of the plaintiff or his family still exists.

46a. Public Law 91-452, Title II, §§501 and 502, 84 Stat. 933, provides that:

> "Sec. 501. The Attorney General of the United States is authorized to provide for the security of Government witnesses, potential Government witnesses, and the families of Government witnesses and potential witnesses in legal proceedings against any person alleged to have participated in an organized criminal activity."

"Sec. 502. The Attorney General of the United States is authorized to rent, purchase, modify, or remodel protected housing facilities and to otherwise offer to provide for the health, safety, and welfare of witnesses and persons intended to be called as Government witnesses in legal proceedings instituted against any person alleged to have participated in an organized criminal activity whenever, in his judgment, testimony from, or a willingness to testify by, such a witness would place his life or person, or the life or person of a member of his family or household, in jeopardy. Any person availing himself of an offer by the Attorney General to use such facilities may continue to use such facilities for as long as the Attorney General determines the jeopardy to his life or person continues."

46b. Prior to plaintiff's entry into the Witness Protection Program the Attorney General made a determination that by having plaintiff testify in federal court his life and his family's well-being would be placed in jeopardy.

46c. The Attorney General has never determined, since January, 1974, that a threat to plaintiff's life or his family's well-being no longer exists.

In fact, serious threat of bodily harm continues to exist against the plaintiff and his family as a result of his decision to testify for the United States of America in federal criminal trials.

47. An actual controversy has arisen as herein set forth, and accordingly, plaintiff seeks a declaration as to rights, duties, status, and other legal relation between plaintiff and defendants, United States of America, Griffin Bell and William E. Hall, arising under and out of the provisions of Public Law 91-452 concerning the Witness Protection Program.

WHEREFORE, plaintiff prays:

(1) That this court declare that the plaintiff's rights are vested and binding and that under the terms of the statute the defendants have no right to discharge him from the United States Marshal's Witness Protection Program for so long as a real danger to the plaintiff's life or his family's well-being exists.

(2) That this court determine the amount of money due plaintiff from defendants.

(3) That this court determine the status of plaintiff with reference to defendants.

(4) That this court provide for the recovery by plaintiff of the necessarily incurred legal fees by reason of the above action, and plaintiff prays that said amounts be reimbursed to him by the defendants. Further, plaintiff prays for

suit costs and reasonable attorney's fees.

(5) That this court make such decrees as it may deem necessary to carry out its determination.

(6) That this court make such other and further orders or decrees as justice may require.

COUNT III

Plaintiff realleges and makes a part hereof, all of the allegations contained in paragraphs two through forty-seven.

48. This is an action for an injunction prohibiting the United States Department of Justice from withholding agency records which are of direct concern to the plaintiff and to order the production of the records improperly withheld from plaintiff.

49. The jurisdiction of this court is evoked pursuant to The Freedom of

Information Act, Title 5, United States Code, Section 552.

50. On June 2, 1975, plaintiff through his undersigned attorney requested the following information from the United States Department of Justice:

(a) Department of Justice Memorandum No. 616, published March 27, 1969, and the Supplement thereto, published August 24, 1970;

(b) Department of Justice Memorandum No. 734, published March 15, 1971, and the Supplement thereto, published February 4, 1972;

(c) Department of Justice Memorandum No. 792, published January 29, 1974; and

(d) Department of Justice Order published January 10, 1975, which relates to government witnesses involved in the Witness Protection Program.

51. Pursuant to the recent Amendment (Public Law 93-502) to the Freedom of Information Act, Title 5, United States Code, Section 552(a)(6)(A), the United States Department of Justice has the period of ten (10) days after the receipt of any such request for records to determine whether to comply with such request.

52. Pursuant to Title 5, United States Code, Section 552(a)(6)(B), an agency is permitted an extension of no more than ten (10) days and then only in unusual circumstances, enumerated with particularity by the statute. Every extension of time must include a written notice to the person making such request by setting forth the reasons for such extension.

53. It has been more than thirty days since plaintiff has requested

information from the United States Department of Justice pursuant to The Freedom of Information Act. Plaintiff has received no answer to his request, plaintiff in good faith believes his administrative remedies have been denied and that his only remedy remains by filing this lawsuit with the court.

54. The information requested by plaintiff is particularly important as it relates to governmental obligations concerning witnesses under protection by the United States Marshal Service. Plaintiff was under the protection of the United States Marshal's Service from January, 1974 until on or about May 15, 1975, when plaintiff was wrongfully, intentionally, and maliciously abruptly dropped from the Witness Protection Program.

55. Plaintiff is suing defendants

as alleged in count I for Implied Contract, in count II for Declaratory Relief, in count III for a Writ of Mandamus, and in count IV for Injunctive Relief. Plaintiff needs the requested information, which is vital to the proper preparation and presentation of his case.

WHEREFORE, plaintiff prays:

(1) That pursuant to the express language contained in Title 5, United States Code, Section 552(a)(3) and Section 552(a)(4), and Rule 65, Federal Rules of Civil Procedure, an Injunction be entered prohibiting the defendants from withholding agency records.

(2) That this court order the defendants to forthwith produce the requested documents to plaintiff or his attorney for their inspection.

(3) That pursuant to the express language contained in Title 5, United

States Code, Section 552(a)(4)(E), the court assess against the United States reasonable attorney's fees and other litigation costs reasonably incurred by this action.

(4) That this court grant such other and further relief as may be just.

COUNT IV

56. Plaintiff alleges and makes a part hereof, all of the allegations in paragraphs two through fifty-five, omitting however, paragraph four, five, six, seven and ten.

57. The jurisdiction of this court is evoked pursuant to Title 28, United States Code, Section 1331.

58. Plaintiff worked for the Bureau of Narcotics and Dangerous Drugs (BNDD) and its successor, the Drug Enforcement Agency, from January 20, 1970, until November, 1973, as a 'special employee'

and witness for the government in numerous criminal cases against major drug traffickers.

59. As a 'special employee' of the Drug Enforcement Agency, plaintiff's duty was to infiltrate drug smuggling operations, obtain information about these operations, report this information to officials of the United States government and later to testify against alleged violators of the drug laws of the United States government.

60. All the defendants knew of the personal danger that the plaintiff was exposed to in his job and were aware of the potential danger to plaintiff's family that could occur due to the nature of plaintiff's work and his exposure to underworld criminals. Recognizing the need to afford protection to plaintiff, and in consideration of plaintiff's

further services, the United States, through its Marshal Service, placed plaintiff under the Witness Protection Program.

61. On or about January, 1974, at the city of Hollywood, Los Angeles County, California, plaintiff met with officers of the Marshal Services and orally agreed to continue to testify for the United States in legal proceedings instituted by the government against persons alleged to have participated in organized criminal activity. In consideration of plaintiff's promise, plaintiff was to be placed under the United States Marshal's Witness Protection Program, a provision of the Organized Crime and Control Act of 1970, Public Law 91-452, in January, 1974 and to be provided with:

(1) Free medical and dental care for himself and his family.

(2) That officers of the United States Marshal's Service would have plaintiff's status changed from refugee to permanent resident.

(3) That plaintiff and his family would be relocated in another city and given a new identity so that plaintiff and his family would be able to begin a new life without fear for their own safety.

(4) That officials in the United States Marshal Service would work with plaintiff to find plaintiff a job commensurate with plaintiff's new identity.

(5) That plaintiff would be paid the $890.00 per month subsistence money allotted to plaintiff under the Program for at least six months after plaintiff concluded all testimony for the United States, but probably extending for a

longer period of time due to the injuries plaintiff received in an automobile accident occurring in November, 1973 while plaintiff was employed by the DEA.

(6) Protection for the plaintiff and his family would continue until the United States was certain that plaintiff's life would no longer be in danger.

62. Plaintiff in good faith has testified for the government against persons connected with illegal drug trafficking approximately twenty to twenty-five times from 1970 through 1974 with the resulting convictions of approximately three hundred persons and plaintiff is now ready, willing and able to testify, and has been so requested by agents of defendant, United States of America in upcoming federal narcotic cases.

63. The Attorney General of the United States is responsible for providing for the health, safety and welfare of witnesses and their families and persons intended to be called as government witnesses and their families under Public Law 91-452, Title V, Section 501-504. (See Title 18, U.S.C.A., Chapter 223, comment).

64. While on the Witness Protection Program between January, 1974 and May, 1975 and again from October, 1975 to January, 1976 and from March, 1976 to present plaintiff was suffering from injuries received in two automobile accidents and in addition, plaintiff had other medical problems which required immediate medical attention. Plaintiff's wife also had need, while her husband was on the Witness Protection Program, for medical attention. With knowledge of

these medical conditions or with reckless indifference to plaintiff's physical health, defendants Pope, Cameron, Forsht, Noe and other unknown defendant officials of defendant United States of America, refused or otherwise failed to provide plaintiff with timely medical care. Such intentional misfeasance and/or nonfeasance and/or grossly negligent and/or indifferent conduct by the employees of the United States Marshal Service and United States Department of Justice caused the plaintiff to suffer and bear undue pain and suffering, mental anguish, physical discomfiture, and emotional trauma. As a direct consequence of the defendant, United States of America, employees' actions the plaintiff was required to undergo painful and disabling surgery in 1977 and plaintiff will have to undergo future

surgery.

65. Plaintiff has received numerous threats on his life from persons involved in illegal drug trafficking. Three attempts were made upon plaintiff's life occurring on or about January 18, 1975, and in about April, 1975 and in or about August, 1975. In the April, 1975 attempt on his life, plaintiff telephoned for police assistance to escort his wife and himself safely out of the building where the attempt on plaintiff's life had occurred. All of these said attempts on plaintiff's life were known at the time of said attempts to all defendants.

66. With knowledge of the danger to plaintiff's life and his family's safety, known and unknown defendant employees of defendant United States of America wrongfully and maliciously discharged and caused to be discharged the plaintiff and

his family from the Witness Protection Program on or about May 15, 1975 until in or about October, 1975 and from January or February, 1976 until March, 1976. From May 15, 1975 until in or about October, 1975 the plaintiff did not receive the $890.00 per month subsistence money allotted to plaintiff under the Program or any part thereof. Furthermore, by the actions of all defendants in maliciously discharging plaintiff from the Program, the defendants knew, or should have known, that said actions would inflict emotional distress, apprehension, anxiety and nervousness on plaintiff and his family and further, that the defendant knew or should have known that by their actions the plaintiff and his family would be exposed unnecessarily and needlessly to grave personal danger and risks by those

individuals plaintiff had informed against.

67. The defendants, with full knowledge of their obligation to plaintiff, of the threats on plaintiff's life and of the potential danger to plaintiff and his family, failed to provide plaintiff with procedural and substantive due process by their abrupt discharge of plaintiff from the Witness Protection Program. Without just cause, without prior notice, without a hearing, and without regard to the plaintiff or his family's safety and well-being, plaintiff was dropped from the Program. The actions of defendant United States of America employees, including but not limited to defendants Forsht, Noe, Cameron and Pope, in discharging plaintiff from the protection of the Witness Protection Program, was under-

taken against the plaintiff maliciously, wantonly, willfully and with gross disregard by said officials. Said individual defendants took such action against the plaintiff, in part, due to the plaintiff exercising his First Amendment right of free speech. Specifically, it is alleged that the plaintiff caused the officials controlling the Witness Protection Program to be reported in various newspapers of general circulation in the United States as not adequately providing for protected witnesses and in not abiding by the original terms of the agreement with the protected witnesses.

68. Further, the defendants' withdrawal of protection without any justifiable basis constituted an unwarranted invasion of plaintiff's constitutional rights to be secure in his person from

harrassment by the Federal government; and to be secure in the privacy of one's own body against an invasion by the Federal government, except when necessary to support compelling governmental interest. Here the invasion of plaintiff's constitutionally protected rights has occurred by defendants' employees exposing plaintiff recklessly to the 'criminal element' after enlisting his aid against the very same people and after assuring plaintiff that they, the defendants, would never do same to him or his family.

69. Further, plaintiff's constitutionally protected right to be free from cruel and inhuman punishment was violated by defendant employees' callous discharge of plaintiff from the Witness Protection Program. In addition, by the reckless discharge of the plaintiff from the

Program the defendants and their agents and employees utilized excessive psychological and emotional force on the plaintiff and his family. The said defendant employees recognized and knew that after the discharge from the Witness Protection Program, plaintiff, his wife, and his family's safety would be jeopardized by individuals seeking to retaliate against plaintiff for his earlier assistance to the United States of America, both in plaintiff's capacity as a government informer and later as a government witness.

70. As a direct and proximate result of defendants' acts in dropping plaintiff from the Witness Protection Program, plaintiff and his family have lived in constant fear. Plaintiff has not been able to work nor to obtain work as a result of the defendants' combined

actions until recently. Further, plaintiff and his family had to voluntarily go into hiding for fear that their safety would be jeopardized by those who plaintiff informed on and testified against as a government informer and government witness during May, 1975 through October, 1975 and June, 1976 through May, 1976.

WHEREFORE, by reason of the willful actions of all of the defendants, plaintiff has sustained damages in an amount in excess of three hundred thousand ($300,00.00) dollars; further, plaintiff necessarily incurred legal fees by reason of the above action and prays that said amounts be reimbursed to him by the defendants; further, plaintiff prays for suit costs and reasonable attorney's fees; and a trial by jury on all issues so triable.

COUNT V

71. Plaintiff realleges and makes a part hereof all of the allegations contained in paragraphs one through seventy.

72. This is an action in equity to seek a preliminary and permanent injunction against all of the individual defendants to compel them to reinstate the plaintiff to the Witness Protection Program; to provide protection to the plaintiff and his family, to provide subsistence to the plaintiff and his family, to provide medical and dental care to the plaintiff and his family and to provide adequate housing and employment for the plaintiff and his family.

73. Plaintiff has been a witness for the United States in criminal proceedings instituted against persons alleged to have participated in organized

criminal activity and plaintiff was informed by members of the United States Department of Justice that he may be called as a government witness in future actions brought by the United States Department of Justice against persons alleged to have participated in organized criminal activity.

74. Plaintiff was initially placed under the United States Marshal's Witness Protection Program, a provision of the Organized Crime and Control Act of 1970, Public Law 91-452, in January, 1974 because agents of the United States Department of Justice stated that they feared for the safety of the plaintiff and his family's welfare as a result of plaintiff's cooperation with federal law enforcement officials.

75. Pursuant to Public Law 91-452, witnesses and their families, or persons

intended to be government witnesses in actions to be instituted against persons alleged to have participated in an organized criminal activity and the witnesses' families are to be offered protection by the United States Department of Justice and the United States Marshal Service in order to insure their health, safety and welfare.

76. Plaintiff and his family were continued on the Witness Protection Program from approximately January, 1974 until early May, 1975. The plaintiff and his family were removed from the Witness Protection Program by the defendants without adequate legal excuse, and even though a serious and continuing threat to the plaintiff's safety and his family's safety existed from persons involved in organized criminal activity who plaintiff had informed on and testified against at

the defendants' request.

77. In or about October, 1975 until January, 1976, the plaintiff and his family were reinstated on the Witness Protection Program by these defendants and others.

78. From in or about February, 1976 until March, 1976, the plaintiff and his family was arbitrarily removed from the Witness Protection Program by these defendants and others without adequate legal excuse.

79. In or about April, 1976 until in or about November, 1978, the plaintiff and his family was reinstated to the Witness Protection Program by these defendants and their agents.

80. On or about December 1, 1978, plaintiff and his family was once again arbitrarily removed from the Witness Protection Program by the defendants

without adequate legal excuse even though there still exists a serious threat of greater bodily harm to the plaintiff and his family as a result of his testifying and his expected testimony in federal criminal trials against persons allegedly involved in organized criminal activity.

81. As a result of plaintiff being removed from the Witness Protection Program by the defendants he is no longer receiving protection for himself and his family, nor is he receiving subsistence, medical and dental care, as well as other items previously supplied him, all of which he and his family are in dire need of.

82. Plaintiff has been advised by agents of the defendant, United States of America, during the last two months that there exists persons who are attempting to kill or otherwise seriously injure

plaintiff and/or his family. As a result of these threats and earlier ones known to the defendants, plaintiff remains in hiding and is unable to carry on a normal life and raise his family.

83. Plaintiff has no adequate remedy at law or otherwise for the harm and/or damage which he and his family will incur due to the lack of protection and subsistence that he and his family no longer receive from the defendant; unless plaintiff is reinstated on the Witness Protection Program and provided the necessary funds upon which to live and support he and his family, plaintiff will be forced to come out of hiding and, if he does, plaintiff and/or his family will suffer greater bodily harm and/or death.

84. Plaintiff will suffer irreparable harm, damage and injury unless the acts of defendants above complained of

are enjoined.

WHEREFORE, plaintiff prays that pursuant to Rule 65, Federal Rules of Civil Procedure, a preliminary injunction issue enjoining defendants from refusing to protect him and his family and from refusing to pay plaintiff his subsistence and provide medical and dental care that plaintiff was originally given under the Witness Protection Program, during the pendency of this action.

Plaintiff further prays for suit costs and any and all other relief deemed equitable and necessary by this court to see that justice is done the parties.

Respectfully submitted,

WILLIAM P. CAGNEY, III, P.A.
Attorney for Plaintiff

/S/ WILLIAM P. CAGNEY, III
Suite 900
200 S.E. 1st Street
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(305) 371-1411

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed to the United States Attorney, Attention Mervyn L. Ames, Esquire, 300 Ainsley Building, 14 N.E. First Avenue, Miami, Florida 33132, this 14th day of February, 1979.

/S/ WILLIAM P. CAGNEY, III

APPENDIX E

CONSTITUTION OF THE UNITED STATES AMENDMENTS

AMENDMENT I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances.

AMENDMENT III.

No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

AMENDMENT IV.

The right of the people to be secure in their persons, houses, papers, and

effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life,

liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT IX.

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

THE ORGANIZED CRIME CONTROL ACT OF 1970, Pub.L. 91-452, Title V, §§501-504, 84 Stat. 933, 18 U.S.C. Chap. 223 (1976):

"Sec. 501. The Attorney General of the United States is authorized to provide for the security of Government witnesses, potential Government witnesses, and the families of Government witnesses and potential witnesses in legal proceedings against any person alleged to have participated in an organized criminal activity."

"Sec. 502. The Attorney General of the United States is authorized to rent, purchase, modify, or remodel protected housing facilities and to otherwise offer to provide for the health, safety, and welfare of witnesses and persons intended to be called as Government witnesses, and the families of witnesses and persons intended to be called as Government witnesses in legal proceedings instituted

against any person alleged to have participated in an organized criminal activity whenever, in his judgment, testimony from, or a willingness to testify by, such a witness would place his life or person, or the life or person of a member of his family or household, in jeopardy. Any person availing himself of an offer by the Attorney General to use such facilities may continue to use such facilities for as long as the Attorney General determines the jeopardy to his life or person continues."

"Sec. 503. As used in this title, 'Government' means the United States, any State, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any potential subdivision, or any department, agency, or instrumentality thereof. The offer of facilities to

witnesses may be conditioned by the Attorney General upon reimbursement in whole or in part to the United States by any State or any political subdivision, or any department, agency, or instrumentality thereof of the cost of maintaining and protecting such witnesses."

"Sec. 504. There is hereby authorized to be appropriated from time to time such funds as are necessary to carry out the provisions of this title."

Office - Supreme Ct., U.S.
FILED
AUG 6 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2235

In the Supreme Court of the United States

OCTOBER TERM, 1982

EMILIO GARCIA, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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Solicitor General

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Assistant Attorney General

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QUESTIONS PRESENTED

1. Whether the Due Process Clause of the Fifth Amendment confers a substantive right to participate in the federal Witness Protection Program.

2. Whether the Due Process Clause requires notice and an opportunity for a hearing when the government decides to discontinue the protection provided by the Witness Protection Program.

3. Whether petitioner's Firs. Amendment rights or right to privacy were violated when the government discontinued his participation in the Witness Protection Program after he voluntarily revealed his true identity and whereabouts in the press.

4. Whether a private cause of action for damages may be inferred from the statute pursuant to which the Witness Protection Program was created.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. a-1 to a-26) is reported at 666 F. 2d 960. The opinion and order of the district court dismissing count IV (Pet. App. a-27 to a-28) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 4, 1982. The petition for a writ of certiorari was filed, after an extension, on June 4, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 501-504 of Title V of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 933, 18 U.S.C. prec. 3481, pursuant to which the Witness Protection Program was created, are reproduced in petitioner's appendix (Pet. App. a-88 to a-90).

STATEMENT

1. Title V of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, Section 501, 84 Stat. 933, 18 U.S.C. prec. 3481, authorizes the Attorney General "to provide for the security of Government witnesses, potential Government witnesses, and the families of Government witnesses and potential witnesses in legal proceedings against any person alleged to have participated in an organized criminal activity." The Attorney General may provide protected housing facilities and other protective services "whenever, in his judgment, testimony from, or a willingness to testify by, such a witness would place his life or person, or the life of a member of his family or household, in jeopardy." Any person who accepts an offer to use such facilities "may continue to use [them] for as long as the Attorney General determines the jeopardy to his life or person continues."

Pursuant to this statutory authorization, the federal Witness Protection Program (hereinafter "the Program") was created. Participants in the Program are protected by the United States Marshals Service. See 28 C.F.R. 0.111(c). The Marshals Service may assign personnel to guard a participant or may give the witness a new identity and relocate him in another part of the country (Pet. App. a-8). See also *Doe* v. *Civiletti*, 635 F. 2d 88, 90 (2d Cir. 1980).

2. In the 1970's, petitioner infiltrated various drug smuggling operations on behalf of the Drug Enforcement Administration (DEA) and its predecessor agency (Pet. App. a-64). He reported the information he collected to federal authorities and served as a government witness in prosecutions of drug smugglers (*id.* at a-64, a-67). Because of these activities, petitioner was offered and accepted the protection of the Witness Protection Program (*id.* at a-64 to a-65). Petitioner and the Marshals Service then entered into an oral agreement setting forth the conditions of petitioner's participation. The Marshals Service agreed, among

other things, to relocate petitioner in another city and to supply him with a new identity (*id.* at a-66). However, continued protection was conditioned upon petitioner's " 'staying away from criminals, people that knew him and staying out of trouble' " (*id.* at a-8). In May 1975, after nearly 16 months' participation in the Program, petitioner approached the Miami Herald, a newspaper in the city in which he resided, and gave an interview concerning the Program (*id.* at a-3 to a-4; R. 313, 690-707).[1] Petitioner's real name and his photograph appeared in the newspaper together with the initial article discussing his participation in the Program (R. 690-692), and a series of articles followed (R. 693-707). Soon after the appearance of these articles, the Marshals Service terminated petitioner's participation in the Program.

3. Petitioner then brought suit in the United States District Court for the Southern District of Florida seeking reinstatement, damages, and other relief. In Count IV of his complaint, in which four employees of the Marshals Service were named as defendants in their individual capacities,[2] petitioner sought $300,000 in damages for alleged violations of his constitutional rights. He contended that discontinuation of his participation in the Program violated substantive and procedural rights protected by the Due Process Clause of the Fifth Amendment, as well as his constitutional right to privacy, his First Amendment right to free speech, and the Eighth Amendment prohibition against cruel and unusual punishment (Pet. App. a-72 to a-75).

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[1]"R." refers to the record in the court of appeals.

[2]Petitioner asserts (Pet. 2-3 n.2) that his complaint included a claim for damages against former Attorney General Griffin Bell and William E. Hall, the Director of the Marshals Service. However, paragraphs 5, 7, and 56 of the complaint (Pet. App. a-33, a-63) show that those individuals were not named as defendants in count IV. Thus, the only individual respondents are Donald D. Forsht, Frank W. Noe, John W. Cameron, and Raymond Pope.

After extensive discovery, the district court dismissed count IV (Pet. App. a-27 to a-28).[3] The court of appeals affirmed (*id.* at a-1 to a-26), concluding that count IV did not state a claim for relief under any of the constitutional provisions upon which petitioner had relied. The court held that the Due Process Clause did not confer a right to participate in the Program and therefore that discontinuation of petitioner's participation did not violate substantive due process (*id.* at a-10 to a-11). The court also rejected petitioner's procedural due process claim, since participants in the Program lack a property or liberty interest in continued participation (*id.* at a-11 to a-15), and rejected petitioner's right to privacy claim (*id.* at a-19 to a-20), noting that removal from the Program did not constitute a governmental restriction upon his privacy and that continued participation in the Program "is not a constitutional or fundamental right entitled to privacy protection" (*id.* at a-20).

The court of appeals also found no merit in petitioner's First Amendment claim (see Pet. App. a-15 to a-18). The court noted that petitioner had "materially and substantially interfered with the purpose and efficiency" of the Program by revealing his identity and location and that petitioner "could have criticized the Program without identifying himself and his location publicly" (*id.* at a-18). The court therefore held that the government's interest in preserving the anonymity of participants in the Program outweighed petitioner's interest in revealing his identity (*id.* at a-17).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any court of

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[3]The rest of the case was subsequently dismissed or settled (R. 1508-1509).

appeals. Accordingly, further review by this Court is not warranted.

1. Petitioner contends (Pet. 17-27) that the termination of his participation in the Witness Protection Program violated substantive rights protected by the Due Process Clause, including the right to privacy (Pet. 44-48). Under the Due Process Clause, petitioner claims (Pet. 17-24), those who testify against organized crime figures have an unconditional right to the special federal protection provided by the Witness Protection Program. Petitioner also maintains (Pet. 25) that even if participation in the Program was not constitutionally mandated, the Due Process Clause limited the circumstances under which that participation could be terminated without his consent. Petitioner's arguments are frivolous.

As the court of appeals noted, the "Constitution does not require the establishment of the Witness Protection Program" (Pet. App. a-10). The Program furnishes special, costly protection beyond that received by most citizens or government witnesses, and no individual has a constitutional right to such protection. Cf. *Turner* v. *United States*, 248 U.S. 354, 357-358 (1919) (the government has no substantive duty to protect its citizens from criminal activity). The framers of the Bill of Rights would have been surprised indeed to learn that the Fifth Amendment guaranteed the extraordinary protection provided by the Witness Protection Program. Title V of the Organized Crime Control Act of 1970 was not enacted to vindicate a constitutional right that had been violated for nearly two centuries but to permit the Attorney General, in the sound exercise of his discretion, to confer a special benefit upon certain individuals. See *Doe* v. *Civiletti, supra*, 635 F. 2d at 89; H.R. Rep. No. 91-1549, 91st Cong., 2d Sess. 48 (1970).

Nor does the Due Process Clause confer a substantive right to remain in the program once accepted. Citing *Richardson* v. *Belcher*, 404 U.S. 78 (1971), petitioner claims (Pet. 25-27) that termination of his participation in the Program constituted arbitrary government action. *Richardson* v. *Belcher, supra*, held that a statutory classification in the Social Security Act did not violate due process because it was "rationally based and free from invidious discrimination" (404 U.S. at 81, quoting *Dandridge* v. *Williams*, 397 U.S. 471, 487 (1970)). The decision to discontinue petitioner's participation in the Program after he voluntarily disclosed his true identity and whereabouts in the press clearly met that test.

Petitioner's argument is not bolstered by the assertion (Pet. 47) that his "initial participation in the Program and his subsequent termination, greatly affected matters relating to his marriage, procreation, family relationships, child rearing and education." Any effect upon these matters is incidental and results, not from government restrictions, but from petitioner's decision to expose himself to risk by disclosing his identity and whereabouts. In essence, petitioner argues that the government must undergo the expense of relocating him and providing him with another new identity. And, if he later chose to reveal his identity and whereabouts once again, presumably a third relocation and a third new identity would be constitutionally mandated. Due process does not require such an expenditure of public funds. In a case in which true privacy interests were implicated, this Court observed (*Harris* v. *McRae*, 448 U.S. 297, 317-318 (1980)): "Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom. To hold otherwise

would mark a drastic change in our understanding of the Constitution." Here, the Due Process Clause does not confer an entitlement to such funds as may be necessary to provide petitioner with special protection despite his own counterproductive behavior.

2. Petitioner contends (Pet. 27-28) that termination of his participation in the Program without notice and an opportunity for a hearing violated procedural due process. He asserts (Pet. 30-35) that participation in the Program constitutes a "property" interest conferred by statute and (Pet. 35-38) that the discontinuation of his participation deprived him of "liberty" as well. The court of appeals correctly rejected these arguments, finding that petitioner had no constitutionally protected "property" or "liberty" interest in continued participation in the Program (Pet. App. a-11 to a-15).

a. "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a[n] unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972). The statute pursuant to which the Witness Protection Program was devised did not create a property interest in the continued receipt of benefits. *Doe* v. *Civiletti, supra*, 635 F. 2d at 97 n.21. Instead, it merely authorized the Attorney General, in his discretion, to extend special protection in certain cases. Neither the statute nor its legislative history suggests that Congress intended to confer an entitlement to continued participation in the Program. Rather, Congress intended to grant the Attorney General "broad authority" to determine which witnesses should be offered special protection, the nature of the protection, and "the length of time the facilities should be available." H.R. Rep. No. 91-1549, 91st Cong., 2d Sess. 48 (1970). Congress did not intend to leave such decisions to the witnesses because, as Will R.

Wilson, the former Assistant Attorney General in charge of Criminal Division, testified, "Some of the witnesses tend to be imaginative about the danger to them and I would seriously question giving a witness an absolute right to protective facilities in view of the terrible expense involved." *Organized Crime Control: Hearings Before Subcomm. No. 5 of the House Comm. on Judiciary*, 91st Cong., 2d Sess. 182 (1970) (hereinafter "*Hearings*").[4]

Petitioner relies (Pet. 31-35) upon the following provision of Section 502 (84 Stat. 933) to support his contention that the Program creates a property entitlement:

> Any person availing himself of an offer by the Attorney General to use such facilities may continue to use such facilities for as long as the Attorney General determines the jeopardy to his life or person continues.

As the court of appeals noted (Pet. App. a-13), this language was not intended to limit the broad discretion of the Attorney General to decide "the length of time the facilities should be available." See H.R. Rep. No. 91-1549, 91st Cong., 2d Sess. 48 (1970). Instead, it was designed to make clear that protection could be provided after the conclusion of the trial at which the witness testified and "for as long as the Attorney General determines the jeopardy to his life or person continues." See S. Rep. No. 91-617, 91st Cong., 1st Sess. 60 (1970); 116 Cong. Rec. 35292-35293 (1970). Petitioner's construction of this provision (see Pet. 31-35)—that

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[4]Petitioner's reliance upon *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) (Pet. 30-31) is misplaced. There, any individual who met the statutory qualifications for receipt of welfare benefits was entitled to receive them (397 U.S. at 261-262). By contrast, participation in the Witness Protection Program depends upon an exercise of the Attorney General's broad discretion, and no one has an entitlement to a favorable exercise of that discretion. See *Bishop* v. *Wood*, 426 U.S. 341, 344-347 (1976) (where policeman served at will and pleasure of the city he had no entitlement to continued employment).

the government may never withdraw protection without the witness's consent as long as his life remains in danger—would render the meaning of the statute absurd. Under that interpretation, the government would be obligated to bear whatever expense was required to protect a person who refused to comply with any of the measures designed for his protection.

b. Petitioner also contends (Pet. 36-38) that the termination of his participation in the Witness Protection Program deprived him of a liberty interest protected by the Fifth Amendment. However, the court of appeals properly rejected that claim as well (Pet. App. a-14 to a-15). Accord, *Doe* v. *Civiletti*, *supra*, 635 F. 2d at 97 n.21. As previously noted, participation in the Program is not a constitutional right, and when such protection is discontinued in a manner that has no impact upon the former participant's reputation, he is placed in the same position as any other person. Thus, the termination of a witness's participation in the Program does not deprive him of a constitutionally protected liberty interest.

3. Petitioner next argues (Pet. 38-44) that he was unconstitutionally discharged from the Program "in retaliation for exercising his First Amendment rights" (Pet. 38). This contention is also without merit.

In rejecting petitioner's argument, the court of appeals aptly referred (Pet. App. a-16 to a-18) to cases concerning restrictions upon speech by public employees (*Pickering* v. *Board of Education*, 391 U.S. 563 (1968)) and public school students (*Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969)). With respect to public employees, this Court has noted (*Pickering* v. *Board of Education*, *supra*, 391 U.S. at 568):

> [I]t cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that

> differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

See also *Givhan* v. *Western Line Consolidated School District*, 439 U.S. 410, 414 (1979); *Mt. Healthy City Board of Education* v. *Doyle*, 429 U.S. 274, 284 (1977).

Here, as the court of appeals held (Pet. App. a-18), the government's interest in concealing petitioner's true identity and whereabouts far outweighed petitioner's interest in revealing those facts in connection with the interviews he gave to the press. The record before the court of appeals showed that petitioner approached a newspaper in the Miami area, where he had been relocated, and voluntarily revealed his true identity. His picture and real name subsequently appeared in the paper (Pet. App. a-18; R. 313, 690-692). As the court of appeals noted, petitioner's conduct substantially and materially undermined the efficient operation of the Program and made it much more difficult and expensive to protect him. While public comment concerning problems with the Program is important public debate, petitioner could have readily made such comment without destroying the anonymity essential to the Program's success.[5]

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[5]Petitioner contends (Pet. 17-20 & n. 18, 26 & n. 20, 43-45 & n. 23) that the court of appeals erred in looking beyond his complaint and taking into consideration petitioner's answers to interrogatories and the articles in the Miami Herald, which were part of the record in the district court (R. 690-707) and to which petitioner referred in his complaint (Pet. App. a-73). However, an appellate court may affirm a lower court decision on an alternative ground that appears in the record (see

Petitioner maintains (Pet. 41) that his relationship to the government was not analogous to that of a public employee but was "one of citizen in general to the government." However, the government placed no restrictions whatsoever on petitioner's speech as an ordinary citizen. The government merely decided that it would not bear the expense of providing special protection to petitioner after he voluntarily chose to place himself in danger by disclosing his identity and location.

4. Petitioner contends (Pet. 49-50) finally, that a private cause of action for damages against the individual defendants may be inferred from the statute pursuant to which the Witness Protection Program was created. Count IV of petitioner's complaint, the dismissal of which is all that he appealed, does not contain such an allegation, and that claim was not otherwise raised in the district court or the court of appeals. Accordingly, petitioner's argument should not be considered by this Court. Cf. *Youakim* v. *Miller*, 425 U.S. 231, 233-234 (1976).

In any event, petitioner's claim has no merit. "[T]he question whether a statute creates a private right of action is ultimately 'one of congressional intent * * *' " (*Universities Research Association* v. *Coutu*, 450 U.S. 754, 770 (1981), quoting *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 578 (1979)), and there is nothing in "the 'language and focus of the statute, its legislative history, [or] its purpose' " (*Universities Research Association, supra*, 450 U.S. at 770; quoting *Touche Ross & Co.* v. *Redington, supra*, 442 U.S. at 575-576; *Cort* v. *Ash*, 422 U.S. 66, 78 (1975)) to suggest

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Schweiker v. *Hogan*, No. 81-213 (June 21, 1982), slip op. 15 n.24), and petitioner's answers to interrogatories and the newspaper articles could properly be considered in ruling upon a motion to dismiss petitioner's complaint (see Fed. R. Civ. P. 12(b), 56(c)).

that Congress intended to create a private cause of action. To the contrary, the statutory language (see Pub. L. No. 91-452, Title V, Section 502, 84 Stat. 933), the legislative history (see, *e.g.*, *Hearings, supra*, at 181-182), and the legislative purpose show that Congress merely intended to authorize the Attorney General to provide special protection in certain cases where, in his judgment, such protection would assist in the discharge of his prosecutorial functions.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6]Petitioner relies solely upon alleged violations of constitutional and statutory rights. He does not claim breach of contract.

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